INDEX

	Page
Statement as to jurisdiction	1
I. Jurisdiction	2
II. Statute involved	2
The original act	3
The subsequent amendments	5
III. Dates of judgment and appeal	9
IV. Nature of case	9
1. Case and rulings are such as to support jurisdiction here	10
2. Cases sustaining jurisdiction to review upon appeal	13
3. Questions involved are substantial	14
Constitutional questions	14
Other questions	17
Aircraft and *Wade* cases	19
Other cases do not destroy appeal	28
V. Opinions	30
Appendix	32
Earlier opinion of the court denying appellee's motion for summary judgment, 56 Fed. Supp. 308 (Filed August 2, 1944)	32
Opinion of the court granting appellee's motion and dismissing complaint (Filed July 14, 1947)	37
Order issued by appellee on October 23, 1943 under Renegotiation Act	38
Text of Renegotiation Act and amendments thereto	39
Original Renegotiation Act	40
First amendment, October 21, 1942 [Adding Treasury Department to renegotiating agencies and defining subcontracts]	44
Second amendment, July 1. 1943 [Adding Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company to renegotiating agencies]	52

Page

Third amendment, July 14, 1943 [Adding War Brokers' Contracts] 53
Fourth amendment, February 25, 1944 [Revising Renegotiation Act] 55

TABLE OF CASES CITED

A. B. Small Co. v. *American Sugar Refining Co.*, 267 U. S. 233 15
Aircraft & Diesel Equipment Corp'n v. *Hirsch*, — U. S. —, decided June 16, 1947 ..... 3, 14
A. L. A. Schechter Poultry Corp. v. *United States*, 295 U. S. 495 15
Allen v. *Regents*, 304 U. S. 439 27
American Life Ins. Co. v. *Stewart*, 300 U. S. 203 25
Ashwander v. *T. V. A.*, 297 U. S. 288 27
Ayrshire Collieries Corp'n v. *United States*, 91 L. Ed. 1006, decided April 28, 1947 12
Bowles v. *Willingham*, 321 U. S. 503 15
Brooks-Scanlon Corp'n v. *United States*, 265 U. S. 106 17
Busch v. *Jones*, 184 U. S. 598 25
Calder v. *Bull*, 3 Dall. 386 17
California v. *Latimer*, 305 U. S. 255 27
Cappellini v. *Comm'r*, 14 B. T. A. 1269 21
Carter v. *Carter Coal Co.*, 298 U. S. 238 15
Chicago, Burlington & Quincy R. R. v. *Osborne*, 265 U. S. 14 24
Cline v. *Frink Dairy Co.*, 274 U. S. 445 15
Coffman v. *Breeze Corp.*, 323 U. S. 316 14
Connally v. *General Construction Co.*, 269 U. S. 385 15
Continental Illinois National Bank & Trust Co. v. *C. R. I. & P. Ry. Co.*, 294 U. S. 648 17
Corporation Comm'n of Oklahoma v. *Cary*, 296 U. S. 452 25
Crowell v. *Benson*, 285 U. S. 22 19
Davis v. *Wallace*, 257 U. S. 478 18
Dawson v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288 ..... 12, 25
Eagle Glass & Mfg. Co. v. *Rowe*, 245 U. S. 275 27
Educational Films Corp'n v. *Ward*, 282 U. S. 379 27
Euclid v. *Ambler Realty Co.*, 272 U. S. 365 30

BLEED THROUGH - POOR COPY

Page

Fahey v. *Mallonee*, — U. S. —, decided June 23, 1947 22
Gibson v. *United States*, 329 U. S. 338 24, 27
Graves v. *Texas Co.*, 298 U. S. 393 27
Hillsborough v. *Cromwell*, 326 U. S. 620 18, 24, 27
Hirsh v. *Block*, 267 Fed. 614 22
Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229 27
Hopkins v. *Southern California Telephone Co.*, 275 U. S. 393 27
Interstate Commerce Comm'n v. *Louisville and Nashville R. R. Co.*, 227 U. S. 88 16
Louisville and Nashville R. R. Co. v. *Garrett*, 231 U. S. 298 18
Louisville Joint Stock Land Bank v. *Radford*, 295 U. S. 555 17
Lynch v. *United States*, 292 U. S. 571 16, 17
540 28
Macauley v. *Waterman Steamship Corp'n*, 327 U. S.
Mine Safety Appliances Co. v. *Forrestal*, 326 U. S. 371 14, 28
Missouri Pacific Ry. Co. v. *Tucker*, 230 U. S. 340 24
Mosher v. *City of Phoenix*, 287 U. S. 29 18
Mulford v. *Smith*, 307 U. S. 38 14, 27
Ohio Bell Telephone Co. v. *Public Utilities Comm'n*, 301 U. S. 292 16
Oklahoma v. *Guy F. Atkinson Co.*, 313 U. S. 508 14
Oklahoma Operating Co. v. *Love*, 252 U. S. 331 24
Opp Cotton Mills, Inc. v. *Administrator*, 312 U. S. 126 15
Panama Refining Co. v. *Ryan*, 293 U. S. 388 15
Perry v. *United States*, 294 U. S. 330 17
Pierce v. *Society of Sisters*, 268 U. S. 510 27
Porter v. *Warner Holding Co.*, 328 U. S. 395 18
Procter & Gamble Distributing Co. v. *Sherman*, 2 F. (2d) 165 27
Railroad Comm'n of California v. *Pacific Gas & Elec. Co.*, 302 U. S. 388 18
Raymond v. *Chicago Union Traction Co.*, 207 U. S. 20 27
Siler v. *Louisville and Nashville R. R. Co.*, 213 U. S. 175 18
Smith v. *Cahoon*, 283 U. S. 553 30
Southern Ry. Co. v. *Virginia*, 290 U. S. 190 16

Page

Spector Motor Service, Inc. v. *McLaughlin*, 323 U. S. 101 ..... 24, 27
Steele v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192 20
Sterling v. *Constantin*, 287 U. S. 378 18
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38 19
Tennessee Electric Power Co. v. *TVA*, 306 U. S. 118 13
Tunstall v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 20
United Fuel Gas Co. v. *Railroad Comm'n of Kentucky*, 278 U. S. 300 ..... 18, 22
Union Pacific R. R. Co. v. *Board of County Commissioners*, 247 U. S. 282 ..... 24, 26
United States v. *Bethlehem Steel Corp'n*, 315 U. S. 289 17
United States v. *Goltra*, 312 U. S. 203 ..... 27, 28
United States v. *L. Cohen Grocery Co.*, 255 U. S. 81 .. 15
United States v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533 15
United States v. *Standard Rice Co., Inc.*, 323 U. S. 106 17
United States v. *Worley*, 281 U. S. 339 .....
Wade v. *Stimson*, — U. S. —, decided June 16, 1947 ..
Wall v. *Parrot Silver & Copper Co.*, 244 U. S. 407 .. 22
Wickard v. *Filburn*, 317 U. S. 111 14
Willcox v. *Consolidated Gas Co.*, 212 U. S. 19 23
Wilson v. *Illinois Southern Ry. Co.*, 263 U. S. 574 26
Yakus v. *United States*, 321 U. S. 414 ..... 15, 23
Young, Ex parte, 209 U. S. 123 ..... 23, 24, 26
Yu Cong Eng v. *Trinidad*, 271 U. S. 500 15

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 320

LINCOLN ELECTRIC COMPANY,

Appellant,

vs.

JAMES V. FORRESTAL,

Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

This is a suit to enjoin enforcement of the initial Renegotiation Act applicable to the year 1942 on the ground the statute is unconstitutional.

The three-judge District Court, convened pursuant to the Act of August 24, 1937, 50 Stat. 752, Section 3, 28 U. S. C. 380a, overruled appellee's motion for summary judgment. 56 F. Supp. 308. Upon subsequent submission of the case on the merits and upon motions by both parties for judgment, the court granted appellee's motion and dismissed

the complaint. The dismissal came on the ground appellant had not filed petition in the Tax Court, a remedy which, because it was provided by a subsequently enacted statute, was not available when this suit was filed, and which, when it did become available, appellant could not pursue save at the peril of loss of substantial rights.

I. Jurisdiction

This Court has jurisdiction to review upon appeal under the Act of August 24, 1937, 50 Stat. 752, Section 3, 28 U. S. C. 380a. The statute provides that in a case such as this, seeking an injunction restraining enforcement of an act of Congress upon the ground that such act or any part thereof is repugnant to the Constitution:

> "An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case."

II. Statute Involved

The statute, the validity of which is here involved, is the initial Renegotiation Act and the amendments thereto applicable to the year 1942, namely:

1. The original Act of April 28, 1942, Section 403(c), Sixth Supplemental National Defense Appropriation Act, Public Law 528, 77th Congress, 56 Stat. 226, 245.

2. The amendment of October 21, 1942, Section 801 of the Revenue Act of 1942, Public Law 753, 77th Congress, 56 Stat. 798, 982.

3. The amendment of July 1, 1943, Section 1 of the Military Appropriation Act, 1944, Public Law 108, 78th Congress, 57 Stat. 347, 348.

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The subsequent law, enacted by the Revenue Act of 1943 which became effective February 25, 1944 (Public Law 235, 78th Congress, 58 Stat. 21, 78), when the statute was substantially rewritten, is not here involved except only for the provision then made for suit in the Tax Court. As to this provision, considerations quite different from those discussed in *Aircraft & Diesel Equipment Corporation* v. *Hirsch*, decided June 16, 1947, which dealt with the year 1943, apply because (1) this case relates solely to the year 1942, and (2) as will be pointed out, questions not open in *Aircraft* arise on the present record.

The statute and all the amendments are set forth in full in the appendix. The pertinent provisions thereof are as follows:

The Original Act

The original Act of April 28, 1942, applied only to contracts and subcontracts of the War and Navy Departments and the Maritime Commission. In the case of all such contracts it committed to the secretary of each such department, or his delegate, the power of "refixing • • • the contract price." It said:[1]

> "The Secretary of each Department is authorized and directed, *whenever in his opinion excessive profits have been realized*,[2] or are likely to be realized, from any contract with such Department or from any subcontract, thereunder,
>
> (1) to require the contractor or subcontractor to renegotiate the contract price,
>
> (2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a

[1] Section 403(c), Sixth Supplemental National Defense Appropriation Act, Public Law 528, 77th Congress, 56 Stat. 226, 245.

[2] Emphasis supplied throughout.

result of such renegotiation to represent excessive profits, and

(3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor."

This power was to extend to, Sec. 403(c):

"any contract [that is, "any contract for an amount in excess of $100,000"] [3] with such Department [i.e., the War Department, the Navy Department, or the Maritime Commission] or * * * any subcontract thereunder,"

and it was expressly declared to be, Sec. 403(c):

"applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause,[4] provided that final payment pursuant to such contract or subcontract has not been made prior to [April 28, 1942] the date of enactment of this Act."

This power to rewrite not only contracts of the Government but private contracts between third persons—many of them, as here, entered into before the statute was passed and without knowledge that the transaction was even remotely connected with the production of materials for ultimate use in a Government contract—was to be exercised by the secretary, or by anyone to whom he or his appointee in turn might delegate that power. The secretary (that is,

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[3] It was not until the amendment of October 21, 1942 that the statute authorized renegotiation when "the *aggregate sales* * * * under contracts with the Departments and subcontracts thereunder" exceed $100,000.

[4] None of the contracts here in question contained such clause (R. Vol. I, p. 7, Paragraph 26).

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the Secretary of War, the Secretary of the Navy, or the Chairman of the Maritime Commission) the statute declared, may delegate that power, Sec. 403(f):

> "in whole or in part, • • • to such individuals or agencies in such Department as he may designate, and he may authorize such individuals or agencies to make further delegations of such authority and discretion."

The Subsequent Amendments

The statute was amended October 21, 1942.[5] The shape and purpose of the act remained the same. The changes then made, so far as is here material, were:

1. The Treasury Department was added to the renegotiating agencies.

2. A definition of "excessive profits" was supplied. This, however, added nothing to the act. It merely said, in peculiar statutory double-talk, " 'excessive profits' means • • • excessive profits." This is the definition, Sec. 403(a)(4):

> " 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits."

3. The statute as originally passed, mentioned but did not define subcontracts. By the amending act a definition was supplied. It said, Sec. 403(a)(5):

> "The term 'subcontract' means any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term 'article' includes any material, part, assembly, machinery, equipment, or other personal property."

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[5] Sec. 801 of the Revenue Act of 1942, Public Law 753, 77th Congress, 56 Stat. 798, 982.

4. The statute authorized the secretary, "When the contractor or subcontractor holds two or more contracts or subcontracts," to, Sec. 403(c)(1):

> "renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract."

5. The original act authorized the secretary to enforce his determination by the withholding of government funds or by suit. The amending act authorized in addition the enforcement thereof, Sec. 403(c)(2):

> "(i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms
> • • •
>
> (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract • • •"

or by any combination of the several methods.

The statute was amended a second time on July 1, 1943.[6] The only change then made was to add to the Renegotiation Act contracts and subcontracts of:

> Defense Plant Corporation,
> Metals Reserve Company,
> Defense Supplies Corporation,
> Rubber Reserve Company.

This change was not expressly declared to be retroactive. Appellee, however, in the order here in question has so interpreted it, and has required renegotiation of business done in the year 1942 with Defense Plant Corporation.

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[6] Sec. 1 of the Military Appropriation Act, 1944, Public Law 108, 78th Congress, 57 Stat. 347, 348.

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The third amendment came on July 14, 1943.[7] It merely added to the contracts subject to renegotiation the so-called war brokers' contracts

> "under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts thereunder * * *."

This amendment is not here involved for appellant had no such contracts.

The fourth amendment was that made by the Revenue Act of 1943,[8] which became effective February 25, 1944, nearly four months after this suit was filed and more than one month after this suit was at issue by the filing of answer. The substantive provisions of the statute then were entirely rewritten but—except as they emphasize the constitutional frailties of the original act—are not here material. Aside from the provision for suit in the Tax Court presently to be mentioned, the amended statute was not made applicable to the year 1942 except for certain sections (dealing for the most part with contracts declared to be exempt from renegotiation) which have no application to this case. Other sections, laying down standards for administrative conduct, providing for a hearing, and requiring findings to be made, are likewise inapplicable here because they were expressly declared to be applicable only to fiscal years ending after June 30, 1943.

The only portions of the new act which have any bearing on the present case are the provisions authorizing suit in the Tax Court. The statute as then amended specified that with respect to orders dealing with fiscal years ending after

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[7] Public Law 149, 78th Congress, 57 Stat. 564.

[8] Public Law 235, 78th Congress, 58 Stat. 21, 78.

June 30, 1943 issued by the War Contracts Price Adjustment Board, Section 403(c)(1):

> "*In the absence* of the filing of a petition with The Tax Court of the United States * * * *such order shall be final* and conclusive and shall not be subject to review or redetermination by any court or other agency."

However, when it came to deal with orders theretofore issued by a secretary, as in this case, prior to the date of the enactment of the Revenue Act of 1943 (that is, prior to February 25, 1944) with respect to fiscal years ending before July 1, 1943, as in this case, the Congress did not, as it did in Section 403(c)(1) above quoted, say that "In the absence of the filing of a petition * * * such order shall be final," but said instead, in terms which would be appropriate if it were granting an additional optional remedy, that one aggrieved by such order (which would include the present appellant) Section 403(e)(2):

> "*may* within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943 [i.e., February 24, 1944], file a petition with The Tax Court * * *."

The statute purported, however, to condition the grant of the right to persons, circumstanced as was this appellant, to so file by the further proviso that upon such filing the Tax Court's decision would be final and not subject to review. Thus, the statute provided, Section 403(e)(2), that:

> "*Upon such filing* such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as

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of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply."

The "paragraph (1)" referred to is Section 403(e)(1), which says:

"Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reveiwed or redetermined by any court or agency."

III. Dates of Judgment and Appeal

The date of the judgment sought to be reviewed is August 5, 1947. The application for appeal was presented August 12, 1947.

IV. Nature of Case

Appellant is engaged in the manufacture and sale of electric arc welding machines, electrodes and supplies.[9] These articles it manufactured, not pursuant to the specifications of a particular buyer, but for stock from which it then sold, generally by purchase order, to the trade as called upon. Of the company's total sales in 1942 of $33,500,000, but 7.6% was to the United States and its agencies. The balance was to the trade generally, not earmarked for use upon any specific government contracts. Most of these orders—which came in at the rate of 10,000 a month—were in small amounts.[10]

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[9] In the year in question, welding machines accounted for 41% of appellant's sales, electrodes for 53%, and supplies 6% (R. Vol. I, p. 2, Paragraph 4).

[10] For example, on November 13, 1943, shortly after this suit was filed, when the case was to come on for hearing upon appellant's application for a temporary restraining order, of appellant's $3,700,000 of accounts receivable 78.63% was represented by accounts in sums less than $500 (R. Vol. I, p. 101). These sums were owed by customers located in 47 states and other parts of the world (R. Vol. I, pp. 91-3).

In proceedings brought pursuant to the statute, appellee determined that $21,480,000 of the company's business from April 28, 1942, the date of the enactment of the statute, to the end of the year, including contracts theretofore performed but unpaid on April 28, 1942, was subject to renegotiation. Upon the authority of the statute appellee, on October 23, 1943, determined [11] that $3,250,000 of the profits realized by the company in 1942, plus additional sums in the contingencies named in the order, were excessive and declared that:

> "Unless action is taken by you not later than November 5, 1943, to eliminate such excessive profits in a manner satisfactory to me, appropriate action in this respect will be taken by me without further notice to you, by directing the withholding of amounts otherwise due to you, as a contractor or subcontractor, by the Government and by prime contractors with the Government."

The administrative process then was complete. There was no place, save only the equity court, to which appellant could resort to protect itself from the threatened general levy upon its thousands of customers, which was, as appellant believed, unlawful and in defiance of the Constitution. The statute provided no remedy in the Tax Court—that did not come until more than four months later. The company, therefore, filed this suit. It filed it on November 3, 1943, in the District Court for the District of Columbia.

1. Case and Rulings Are Such as to Support Jurisdiction Here

The statute, Act of August 24, 1937, 50 Stat. 752, Section 3, 28 U. S. C. 380a, under which this suit was brought, lodges jurisdiction in this Court to review upon appeal where

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[11] The order is set forth in the appendix.

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"interlocutory or permanent injunction * * * restraining the enforcement * * * of * * * any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States" is granted or denied.

Appellant sought such injunction. It was denied.

Faced with the threat that money "otherwise due" it, not only from the Government but from the company's customers, would be seized, and under command of the statute "be covered into the Treasury as miscellaneous receipts,"[12] appellant challenged appellee's authority to do so. It prayed an injunction on the ground the Renegotiation Act, which appellee tendered as the warrant of his authority, for the reasons set forth in the complaint (Paragraphs 19-33) was invalid under:

1. Article I, Section 1 and Article I, Section 8, Paragraph 18 of the Constitution, in that it unlawfully delegates legislative power by committing to the unrestrained and unguided "opinion" of the secretary the decision whether and how much of a citizen's property is to be taken.

2. Amendment V to the Constitution in that it deprives appellant of its property without due process of law because the statute:

(a) is so vague and uncertain no one can know what it means;

(b) permits the taking upon disclosed and secret evidence and without hearing and findings;

(c) retroactively impairs private contracts and repudiates valid obligations of the United States.

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[12] This disposition is directed by Section 403(c) of the Act of April 28, 1942, and by Section 403(c)(2) of the amendment of October 21, 1942.

3. Amendment V to the Constitution in that it takes appellant's property for public use without just compensation.

4. Amendment X to the Constitution in that it exercises powers not delegated to the United States.

Upon motions for temporary restraining order and for an interlocutory injunction pending final hearing, it was agreed that the order would not be enforced (R. Vol. I, p. 15, Paragraph 41) "until a conclusive decision is reached in the pending litigation." Accordingly, the motions for a temporary restraining order and for interlocutory injunction were not pressed to hearing [13] and the order, of course, has not been enforced.

Appellee then filed answer and after the amendment of the statute on February 25, 1944, permitting suit in the Tax Court, appellee moved for summary judgment. The court, after hearing arguments, overruled the motion. 56 F. Supp. 308. The court said (p. 310):

> "Nor do we think plaintiff has elsewhere and otherwise an adequate remedy. The right to go to the Tax Court did not accrue until long after this suit was instituted, and even if it be considered that the relief afforded by the Tax Court provision is obligatory and exclusive, that certainly is not the case where, as here, it did not exist when suit was brought. *Dawson v. Kentucky Distilleries & W. Co.*, 255 U. S. 288, 41 S. Ct. 272, 65 L. Ed. 638. Nor is the right to sue the United States in the Court of Claims in the circumstances of this case an adequate remedy; for there is no such right there as to plaintiff's thousands of customers who

[13] In the case of a suit such as this, under 28 U. S. C. 380a, unlike 28 U. S. C. 380, which the Court discussed in *Ayrshire Collieries Corporation v. United States*, 91 L. Ed. Adv. Op. 1006, decided April 28, 1947, it is not essential to jurisdiction that an interlocutory order be sought or pressed to hearing.

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necessarily would have to be sued separately where they reside.

Plaintiff brought this suit in the only court having jurisdiction of the persons of the defendants. • • •

Defendants insist that, notwithstanding this and granting also that the Act of Congress is unconstitutional, plaintiff has no other recourse than to challenge the claimed right of the Government in the Tax Court or in the Court of Claims.

We think this is not sufficient."

The court thereupon set the case for hearing. The record was stipulated and, both parties having moved for judgment, the court, on October 16, 1946 (R. Vol. I, insert p. 19):

> "Ordered, that this cause be heard upon all questions properly before the Court upon briefs and oral argument • • •."

The court heard arguments on January 13, 1947, and, on July 14, 1947, announced its opinion granting appellee's motion and dismissing the complaint. Judgment was entered thereon on August 5, 1947. In the court's view the case was controlled by *Aircraft & Diesel Equipment Corporation* v. *Hirsch* and *Wade* v. *Stimson*, decided June 16, 1947, and it accordingly dismissed on the ground:

> "The plaintiff had its opportunity to pursue its administrative remedy and failed to take advantage of it."

As later will be pointed out, *Aircraft* and *Wade* do not justify the dismissal.

2. Cases Sustaining Jurisdiction to Review Upon Appeal

Cases sustaining the jurisdiction of this Court to review upon appeal are:

Tennessee Electric Power Co. v. *Tennessee Valley Authority* (1939), 306 U. S. 118;

Wickard v. *Filburn* (1942), 317 U. S. 111;
Oklahoma v. *Guy F. Atkinson Co.* (1941), 313 U. S. 508;
Mulford v. *Smith* (1939), 307 U. S. 38;
Coffman v. *Breeze Corporations, Inc.* (1945), 323 U. S. 316;
Mine Safety Appliances Company v. *Forrestal* (1945), 326 U. S. 371;
Aircraft & Diesel Equipment Corporation v. *Hirsch* (1947), — U. S. —, June 16, 1947.

3. Questions Involved Are Substantial

The constitutional questions arising upon this record are substantial. And, as will be pointed out, the right to decision thereof is not affected by the *Aircraft* and *Wade* cases.

Constitutional Questions

1. The statute, Section 403(c)(1), commits to the "opinion" of the secretary, without standard, rule or guide of any kind,[14] decision as to whether, and how much of, a citizen's property is to be taken. The secretary is directed to do, or not do, whatever he may think fit, or, Section 403(f), to pass that power to his delegate to be by him exercised however the delegate's "opinion" may dictate. The delegate in turn may pass that power to another—and that other may yield it to yet another—to be by him exercised as he in turn in his "opinion" may see fit.[15] Thus, the citizen is parted from his property, not because the Congress has so required, but because it is the "opinion" of some third

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[14] The standards written into the 1944 act are expressly made inapplicable to fiscal years ending before July 1, 1943. They, therefore, do not apply to this case.

[15] Here the power was delegated by Secretary of the Navy Knox to appellee, under Secretary Forrestal, and by him delegated to the Navy Price Adjustment Board. Proceedings were conducted by that Board but the order then was entered by appellee Forrestal.

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person, or of some delegate or subdelegate of such third person, that he should so be parted from his property. The statute is, therefore, invalid as an unlawful delegation of legislative power and is condemned by:

Panama Refining Co. v. *Ryan* (1935), 293 U. S. 388;
A. L. A. Schechter Poultry Corp. v. *United States* (1935), 295 U. S. 495;
Carter v. *Carter Coal Co.* (1936), 298 U. S. 238;
Bowles v. *Willingham* (1944), 321 U. S. 503;
Yakus v. *United States* (1944), 321 U. S. 414.

2. The statute is so vague and uncertain no one can know what it means. *Yu Cong Eng.* v. *Trinidad* (1926), 271 U. S. 500, 518; *Connally* v. *General Construction Company* (1926), 269 U. S. 385, 391. It is one thing to specify for the future what may be collected, and quite another, after the fact, as here, to say that a price, solemnly agreed to by contract, and which has been paid, is "excessive" because an administrative officer in his uncontrolled discretion says it is. To the one the citizen may be able to conform; to the other, lacking a power of prophecy, he cannot. The statute is, therefore, invalid:

United States v. *Rock Royal Co-operative, Inc.* (1939), 307 U. S. 533, 574;
Opp Cotton Mills, Inc. v. *Administrator* (1941), 312 U. S. 126, 144;
United States v. *L. Cohen Grocery Company* (1921), 255 U. S. 81, 89.

The vagueness of the statute is not made unimportant because it deals solely with a civil liability. The rule, although emphasized in criminal cases, applies to civil liabilities as well:

A. B. Small Company v. *American Sugar Refining Company* (1925), 267 U. S. 233, 239;
Cline v. *Frink Dairy Company* (1927) 274 U. S. 445, 463.

3. The statute permits, because it commits all power to the secretary's unbridled "opinion" the taking, as here, upon secret evidence,[16] without hearing and without findings. This is condemned by:

Southern Railway Co. v. *Virginia* (1933), 290 U. S. 190, 192, 195;

Interstate Commerce Commission v. *Louisville and Nashville Railroad Company* (1913), 227 U. S. 88, 91;

Ohio Bell Telephone Co. v. *Public Utilities Commission* (1937), 301 U. S. 292, 300-5.

4. The statute in terms applies, Section 403(c), not only to contracts thereafter made but also to contracts entered into prior to the enactment of the statute in all cases where "final payment * * * has not been made * * *." Under it appellant was renegotiated upon upwards of $21,000,000 of contracts. Of this amount 27% was upon contracts which were in effect before the statute was enacted, and better than 10% was upon contracts which had been fully performed save only that payment had not yet been made when the statute was passed (R. Vol. I, p. 9, Paragraph 29). Some of the contracts were with government agencies and some with private individuals. Such repudiation by the Government of its own contracts is condemned by:

Lynch v. *United States* (1934), 292 U. S. 571, 579-80;

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[16] The order recites, and the answer (Paragraph 24) admits, that the determination here in question is based in part upon undisclosed data obtained by appellee "from governmental or other reliable [but unnamed] sources * * *." Although such use of secret evidence was challenged (R. Vol. I, p. 13, Paragraph 35) none of it was revealed to appellant until more than two years later, on May 16, 1946, when, in connection with the preparation of the record in this case, the Board's minutes were disclosed to appellant's counsel. It then appeared that among the matters considered by the Board were secret reports that this particular citizen had been "non-cooperative" toward the Government (R. Vol. III, Exhibit 55, p. 136, Paragraph 15).

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Perry v. *United States* (1935), 294 U. S. 330, 350-1;
United States v. *Bethlehem Steel Corporation* (1942), 315 U. S. 289, 308;
United States v. *Standard Rice Company, Inc.* (1944) 323 U. S. 106, 111,

and retroactive impairment of private contracts is condemned by:

Calder v. *Bull* (1897), 3 Dallas 386, 388;
Continental Illinois National Bank & Trust Co. v. *Chicago, Rock Island & Pacific Railway Co.* (1935), 294 U. S. 648, 680;
Louisville Joint Stock Land Bank v. *Radford* (1935), 295 U. S. 555, 602.

5. The statute, because it authorizes seizure of funds otherwise payable to appellant by its customers, takes its property for public use without just compensation, and is condemned by:

Brooks-Scanlon Corporation v. *United States* (1924), 265 U. S. 106;
Lynch v. *United States* (1934), 292 U. S. 571, 579;
Louisville Joint Stock Land Bank v. *Radford* (1935), 295 U. S. 555, 602.

Other Questions

Aside from the constitutional questions on which jurisdiction was founded, appellant claimed also the right to injunction on the ground that the order was in excess of any conceivable authority given to appellee under any reading of the statute, even assuming the statute to be valid, in that:

1. The statute authorized only a bargaining and did not authorize the making of a unilateral order requiring repayment without agreement thereto by appellant.

2. Appellee wrongfully subjected to renegotiation, and ordered repayment on account of:

(a) Subcontracts which were not subcontracts within the meaning of (i) the original act of April 28, 1942, or (ii) the act as amended October 21, 1942.

(b) Contracts entered into with Defense Plant Corporation in 1942, although the statute, when amended on July 1, 1943 to embrace Defense Plant Corporation contracts, did not purport to apply to contracts entered into prior to the date of the amendment.

(c) Contracts in sums less than $100,000, entered into prior to October 21, 1942, which were not made subject to renegotiation by the statute.

3. Appellant, under any reading of the statute, had realized no excessive profits whatever.

The court, having jurisdiction because of the presence of the constitutional questions, had, of course, jurisdiction also to decide these questions, or so many of them as it might be necessary to decide in order to arrive at judgment. It was so held in:

Sterling v. *Constantin* (1932), 287 U. S. 378, 393-4;

Railroad Commission of California v. *Pacific Gas & Electric Co.* (1938), 302 U. S. 388, 391;

Davis v. *Wallace* (1922), 257 U. S. 478, 482;

Louisville and Nashville Railroad Company v. *Garrett* (1913), 231 U. S. 298, 303-4;

United Fuel Gas Company v. *Railroad Commission of Kentucky* (1929), 278 U. S. 300, 307;

Mosher v. *City of Phoenix* (1932), 287 U. S. 29, 30;

Siler v. *Louisville and Nashville Railroad Company* (1909), 213 U. S. 175, 191;

Hillsborough v. *Cromwell* (1946), 326 U. S. 620, 629;

Porter v. *Warner Holding Company* (1946), 328 U. S. 395, 399.

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Aircraft and Wade Cases

The appeal is not made any the less substantial by the *Aircraft* and *Wade* cases. The Court, to be sure, there dismissed, but it did so upon considerations which have no application here.

In *Aircraft*, and in *Wade*, which was decided in a *per curiam* opinion on the authority of *Aircraft*, it must be remembered, the complainant had in fact filed petition in the Tax Court, and in both cases petitions were there pending when the cases came to this Court. This difference alone has far-reaching, and, from the standpoint of the Constitution, controlling consequences. Where, as in *Aircraft* and *Wade*, the complainant has accepted the administrative remedy tendered, there is no denial of a constitutional right in requiring him to exhaust that administrative process before calling upon the courts for relief. Perchance there will be no need for relief when the administrative process is completed. It is quite another matter, however, to deny a hearing to a litigant where, as here, (1) the administrative process was complete at the time the suit was brought, the Tax Court remedy not being made available until long after the suit was filed, and equally or more important, (2) the litigant could not, save at the peril of loss of constitutional rights, pursue the subsequently created administrative remedy. Such is the case here. This Court has never given countenance to the doctrine—which once adopted would bring constitutional limitations to an end [17]—that an administrative process, even where it is, unlike the case here, available when suit is brought, must be pursued

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[17] "That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system * * *." *Crowell* v. *Benson* (1932), 285 U. S. 22, 57; "That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded." *St. Joseph Stock Yards Co.* v. *United States* (1936), 298 U. S. 38, 52.

where that can be done only at the hazard of substantial rights. To the contrary this Court has recognized that there are situations where resort may be had to the courts without pursuing the administrative remedy. Recent examples are:

Steele v. *Louisville & Nashville Railroad Co.* (1944), 323 U. S. 192, 205-7;

Tunstall v. *Brotherhood of Locomotive Firemen & Enginemen* (1944), 323 U. S. 210, 213-4.

The Court expressly recognized this principle in *Aircraft*, for it pointed out that administrative remedies must be pursued (p. 17):[18]

> "where following them could result *in no greater loss* than * * * delay and inconvenience * * *."

As the Court there said (p. 19):

> "the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held *sufficient to dispense with exhausting the administrative process* before instituting judicial intervention."[19]

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[18] All references to the *Aircraft* opinion are to the pages of the preliminary print of the opinion.

[19] Indeed, so far satisfied was appellee that the court below did have jurisdiction, even though appellant had not filed petition in the Tax Court, that, by opening brief upon the argument below, appellee assured the court (defendant's brief, p. 76, Note 32) "the Government does not raise the question of this Court's jurisdiction to decide that [i. e. the constitutional] issue in the present proceedings." Appellee said further (p. 21 of defendant's opening brief, Paragraph 6) "Of the questions sought to be raised by plaintiff, therefore, the only one which the Court may have power to decide is whether the Act on its face is totally invalid." It was explained (defendant's opening brief, p. 22) "The limitation of the District Court's jurisdiction to a determination of the constitutional validity of the statute is by no means novel," and argued that (defendant's opening brief, p. 23, Paragraph 7) "even though the Court has statutory jurisdiction to determine the constitutional validity of the Act on its face, the

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Here, let it be recalled—unlike the situation in the other renegotiation cases this Court has had—when the suit was filed there was no other place to which appellant could go. Thereafter the administrative remedy in the Tax Court was made available. What should appellant have done? Its case was already at issue in the District Court. To dismiss and begin anew in the Tax Court offered it the possibility of presenting its argument that none of its profit was excessive. For example, appellant passed on to its customers, including the United States, the results of economies—brought about by an efficiency which appellee does not gainsay (see answer, Paragraph 29)—to the point where, percentagewise, and even on a dollar basis, appellant realized less than in prewar years [20] (R. Vol. I, p. 6, Paragraph 21; p. 8, Paragraph 27; Exhibit 11, p. 41; Exhibits 39-40, pp. 103-5). This challenge appellant could make by petition to the Tax Court, but it could do so only at the risk of forfeiting its right to challenge the statute on constitutional grounds.

This is so for two reasons.

The *first* is that a litigant ordinarily cannot accept the benefits of a statute and then attack it. That the peril which faced appellant was real is demonstrated by *Cappellini* v. *Commissioner* (1929), 14 B. T. A. 1269. Deficiency was

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Court should decline to exercise its jurisdiction in this case." This is not to say a litigant may admit this Court into jurisdiction. It is merely to point out that the questions raised by this suit are of a substance sufficient to win from counsel an admission that, notwithstanding appellant's failure to resort to the Tax Court, the court below had jurisdiction "in the present proceedings" to pass upon the constitutional question.

[20] In the nine years prior to 1942 appellant's average return before taxes exceeded its return—without renegotiation—in 1942. That average was 28.84%; in 1942 without renegotiation it was 26.88% (R. Vol. I, p. 6, Paragraph 21). After taxes, despite the tremendously increased business, the return was far less (R. Vol. I, p. 6, Paragraph 21). The order would cut this to less than one-half, or, after taxes, to 2.33% (R. Vol. I, p. 8, Paragraph 27).

assessed against Cappellini. He thought the statute under which it was imposed was unconstitutional. He, as permitted, took his complaint to the Tax Court—then the Board of Tax Appeals. The Board "in the view we take of the matter" found itself helpless to pass upon the constitutional questions presented. When it was argued that if the statute violates constitutional rights it was the Board's clear "duty to declare in favor of the Supreme Law, the Constitution," the Board said (p. 1276):

> "It is a sufficient answer that constitutional rights may be waived (*Pierce v. Somerset Railway*, 171 U. S. 641, 648; *Kearney v. Case*, 12 Wall. 275, 281; *Bank of Columbia v. Olney*, 4 Wheat. 235), and if any constitutional rights of petitioners are violated by section 280 they have waived them by initiating the proceeding permitted by that section."

Hirsh v. *Block* (App. D. C., 1920), 267 Fed. 614, 618, reversed on other grounds, (1921), 256 U. S. 135, teaches the same lesson and so do *Wall* v. *Parrot Silver & Copper Company* (1917), 244 U. S. 407, 411-2, and *United Fuel Gas Company* v. *Railroad Commission* (1929), 278 U. S. 300, where this Court said (p. 308):

> "we think that appellants who have procured action by a state commission under a state statute may not assail that action * * *."

On the last decision day the Court emphasized the point in *Fahey* v. *Mallonee*, decided June 23 ,1947, saying:

> "It is an elementary rule of constitutional law that one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions.'"

Second. A litigant choosing to bring suit ordinarily must be held to have accepted the remedy tendered with the conditions imposed.

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While the Congress, significantly, as appellant thought, refused to say, in the case of persons circumstanced as appellant, that, Section 403(c)(1), "In the absence of the filing of a petition with The Tax Court * * * such order shall be final," but instead said that such persons, Section 403(e)(2):

> "*may* * * * file a petition,"

it attached to such filing the proviso that "Upon such filing" the Tax Court's jurisdiction shall be, Section 403(e)(1), "exclusive." Here it is unknown, even now, how far a litigant may be foreclosed by such administrative determination. Said the Court in *Aircraft* (p. 17), "we explicitly reserve decision, upon the question of the finality of Tax Court decisions in these matters."

The peril that faced appellant, therefore, was that, by filing its petition in the Tax Court, it would be held to have waived its right to challenge the statute on constitutional grounds, or at least have committed final decision thereof to an administrative tribunal.

There is, of course, as the Court pointed out in *Yakus* v. *United States* (1944), 321 U. S. 414, 444, "no constitutional requirement that that test [of validity] be made in one tribunal rather than in another," but this is true only (p. 444):

> "so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process * * *."

This danger of loss of rights is alone warrant enough for jurisdiction here. Where the peril is real, resort to another remedy will not be required. This is the teaching of:

Ex parte Young (1908), 209 U. S. 123, 144-9;
Willcox v. *Consolidated Gas Company* (1909), 212 U. S. 19, 53-4;

Missouri Pacific Railway Company v. *Tucker* (1913), 230 U. S. 340;
Oklahoma Operating Company v. *Love* (1920), 252 U. S. 331;
Chicago, Burlington & Quincy Railroad Company v. *Osborne* (1924), 265 U. S. 14,

where the Court held that resort to other proceedings would not be compelled where the relief so tendered could be had only at great hazard. As the Court said in *Ex parte Young* (1908), 209 U. S. 123, 147:

> "to provide a different remedy to enforce a contract, which * * * imposes conditions not existing when the contract was made, was to offer no remedy, and when the remedy is so onerous and impracticable as to substantially give none at all the law is invalid, although what is termed a remedy is in fact given."

In these cases, to be sure, the Court was concerned primarily with money penalties, but a deprivation of constitutional rights stands on no lesser plane.

Uncertainty alone on this point—and especially when looked at as matters stood when the Tax Court remedy first became available—is enough to support appellant's claim to the protection of an equity court. So this Court has held: "the existence of such a remedy is debatable and uncertain," *Union Pacific Railroad Company* v. *Board of County Commissioners* (1918), 247 U. S. 282, 287; "The District Court had jurisdiction * * * *because* of the uncertainty * * *," *Spector Motor Service, Inc.* v. *McLaughlin* (1944), 323 U. S. 101, 105; "there is such uncertainty concerning the * * * remedy as to make it speculative * * *," *Hillsborough* v. *Cromwell* (1946), 326 U. S. 620, 625; "the remedy * * * is an uncertain one. Should it be found unavailable * * * he would be left entirely without remedy * * *," *Gibson* v. *United States* (1946), 329 U. S. 338, 360.

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None of these considerations, of course, could be pertinent either in *Aircraft* or in *Wade*. In both appellant had in fact filed in the Tax Court and petitions there were yet pending when the cases came here. Whatever consequences might flow therefrom *had already attached* and there was nothing the Court could do to relieve that choice. It will be time enough after that remedy, so chosen, has been carried through to a conclusion, to determine what, if anything, the Court can do about it. Manifestly, however, it is quite a different matter to *force* a litigant into that position at the hazard of his constitutional rights.

This case differs from *Aircraft* and *Wade* in other controlling respects:

1. When this suit was brought the Tax Court remedy was not available. Whatever may be the situation of a litigant having choice of a further remedy, the rule ordinarily is that jurisdiction, once having attached, as it did here, is not lost if a different remedy is subsequently made available, or an existing remedy is made certain. As the Court said in *Dawson* v. *Kentucky Distilleries & Warehouse Company* (1921), 255 U. S. 288, 296, "Nor is the equitable jurisdiction lost because since the filing of the bill an adequate legal remedy may have become available," and again, in *American Life Insurance Co.* v. *Stewart* (1937), 300 U. S. 203, 215, "the settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter." See also: *Busch* v. *Jones* (1902), 184 U. S. 598, 599-600, and *Corporation Commission of Oklahoma* v. *Cary* (1935), 296 U. S. 452, 459.

2. There are additional grounds here on which to base jurisdiction in equity which were absent in *Aircraft*. Unlike *Aircraft*, where at most the company (p. 25) "would be

forced to sue some sixteen 'or more' customers" or only "two or three" as defendants claimed, here appellant's customers numbered in the thousands and the amounts owed by them were small (R. Vol. I, pp. 91-3, 101). Moreover, in *Aircraft* the company was assured of the indemnity of the United States, to which the Court pointed. Such is not the case here. The indemnity provision is applicable only to fiscal years ending after June 30, 1943. Section 403(c)(2); Section 701(d) of the amendment of February 25, 1944. It has, therefore, no application in this case.

In short, and in summary—on the question of the right to bring the suit—it is plain that the basis for jurisdiction, absent in *Aircraft*, is here present. This is so for each and all of the following considerations:

1. The subsequently enacted provision for proceedings in the Tax Court, for the reasons already pointed out, itself creates such peril of loss of substantial constitutional rights as to establish an adequate basis for jurisdiction.

2. If the order be enforced—as, but for the intervention of this Court, it will be—appellant will be faced with the necessity of bringing a multiplicity of suits against its customers to recover sums withheld. *Ex parte Young* (1908), 209 U. S. 123, 160; *Union Pacific Railroad Company* v. *Board of County Commissioners* (1918), 247 U. S. 282, 285. These customers are numerous, scattered, and in the main owe but small amounts each (R. Vol. I, p. 6, Paragraph 23, p. 10, Paragraph 30; Exhibit 34, pp. 91-3; Exhibit 38, p. 101).

3. In any such suit, moreover, because decision in any one suit would not be binding in any other, appellant would be unable to get a determination of the issue of the extent to which, if the act be valid, its earnings were excessive. *Wilson* v. *Illinois Southern Railway Company* (1924), 263 U. S. 574, 576-7.

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4. The expense alone of such numerous suits would be prohibitive. *Allen* v. *Regents* (1938), 304 U. S. 439, 448.

5. Appellant would be exposed to the risk of the subsequent uncollectibility of judgments against its customers. *Mulford* v. *Smith* (1939), 307 U. S. 38, 46.

6. The interference with appellant's business would result in injury, irreparable and incapable of measurement. *Pierce* v. *Society of Sisters* (1925), 268 U. S. 510, 536; *Ashwander* v. *Tennessee Valley Authority* (1936), 297 U. S. 288, 322.

7. The threat, if exercised, would operate as an unlawful inducement to breaches of contract. *Hitchman Coal & Coke Company* v. *Mitchell* (1917), 245 U. S. 229; *Eagle Glass & Manufacturing Company* v. *Rowe* (1917), 245 U. S. 275.

8. The money, once covered into the Treasury, would be beyond reach of any suit. *United States* v. *Goltra* (1941), 312 U. S. 203, 208; *Mulford* v. *Smith* (1939), 307 U. S. 38, 46; *Raymond* v. *Chicago Union Traction Company* (1907), 207 U. S. 20, 40. Uncertainty alone on this point would be adequate to support jurisdiction. *Spector Motor Service, Inc.* v. *McLaughlin* (1944), 323 U. S. 101, 105; *Hillsborough* v. *Cromwell* (1946), 326 U. S. 620, 625; *Gibson* v. *United States* (1946), 329 U. S. 338, 360.

9. Even if the money, once seized, could be recovered, appellant could not in any forum recover interest thereon. *Hokpins* v. *Southern California Telephone Company* (1928), 275 U. S. 393, 399-400; *Educational Films Corporation* v. *Ward* (1931), 282 U. S. 379, 386, Note 2; *California* v. *Latimer* (1938), 305 U. S. 255, 261; *Graves* v. *Texas Company* (1936), 298 U. S. 393, 403. See also *Procter & Gamble Distributing Co.* v. *Sherman* (S. D., N. Y., 1924), 2 F. (2d) 165, where Judge Learned Hand observed (p. 166) "the relief is in-

adequate because of the express refusal to allow interest. [The same is true here.[21]] * * * it seems to me plain that it is not an adequate remedy, after taking away a man's money * * * merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all."

Other Cases Do Not Destroy Appeal

The appeal here, moreover, is not foreclosed by the other renegotiation cases which have been here:

Mine Safety Appliances Co. v. *Forrestal* (1945), 326 U. S. 371;
Macauley v. *Waterman Steamship Corporation* (1946), 327 U. S. 540.

Mine Safety did not deal with the problem arising upon this appeal. There it was stipulated that defendant would —as he did—withhold money in an amount sufficient to cover the company's liability. Thus, the suit was converted into one (p. 375) "designed to reach money which the gov-

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[21] Even the appropriation acts which made funds available to pay renegotiation determinations "erroneously collected" did not authorize payment of interest in any event but only at "not to exceed 4 per centum" and then only if "determined to be owing in law or equity." First Deficiency Appropriation Act of 1945, expiring June 30, 1946, 79th Congress, Public Law 40, approved April 25, 1945; Third Deficiency Appropriation Act of 1946, expiring June 30, 1947, 79th Congress, Public Law 521, approved July 23, 1946. Even in the current First Supplemental Appropriation Act, 80th Congress, Public Law 271, approved July 30, 1947, expiring June 30, 1948, there is no commitment to pay interest except "as may be determined by the War Contracts Price Adjustment Board" and then at "not to exceed 4 per centum." Since interest is not recoverable from the Government, 28 U. S. C. 284, "unless upon a contract expressly stipulating for the payment of interest," *United States* v. *Goltra* (1941), 312 U. S. 203; *United States* v. *Worley* (1930), 281 U. S. 339, 341, it is plain that none could be recovered by this appellant because "none of the contracts or purchase orders received by the company in 1942 contained an express provision for the payment of interest" (R. Vol. I, pp. 6-7, Paragraph 23).

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ernment owns," to which the Government obviously was a necessary party. It is not so here. There is no such stipulation. Nothing has been withheld. The order has not been enforced. But, if it should be enforced, so the order recites, it would be enforced by withholding sums "otherwise due" appellant—a seizure, in other words, of appellant's property—by directing contractors, appellant's customers, to withhold payments to appellant and to pay them instead into the Treasury.

Waterman, too, 327 U. S. 540, is quite different. In *Waterman* there was no challenge to the constitutional validity of the statute. *Waterman* accepted the statute but claimed only that the Board proposed to consider contracts which Waterman contended were not intended by the statute to be renegotiable. Where a litigant concedes the validity of a statute but claims only that there is danger it may be too broadly read, there is no reason why he should not pursue his administrative remedy. For that matter an order had not even been entered in that case and might never be. To be sure, in *Aircraft* the Court refused to put *Waterman* aside (p. 13) "for purposes of applying the exhaustion rule" even though (p. 2) "constitutionality was not involved." The absence of a constitutional question in *Waterman* obviously would not distinguish that case in a situation such as was presented in *Aircraft*, or require the Court to halt in mid-passage an administrative process already under way. But it does not follow, because Waterman, who raised no (p. 13) "issues of constitutionality," was told to go to the Tax Court, that the decision settles also this case where the question is whether constitutional rights are to be sacrificed in the process. The Court did not so intimate in *Waterman* nor in *Aircraft*. To the contrary, it recognized that there are situations where a different rule will apply.

Such is this case. That is what the holdings of this Court make plain. Witness, for example, *Smith* v. *Cahoon* (1931), 283 U. S. 553, where the Court said (p. 562):

> "the principle is well established that when a statute, valid upon its face, requires the issue of a license or certificate * * * one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain * * *. This principle, however, *is not applicable where a statute is invalid upon its face and an attempt is made to enforce its penalties in violation of constitutional right.*"

Euclid v. *Ambler Realty Company* (1926), 272 U. S. 365, declares the same principle. The Court said (p. 386):

> "A motion was made in the court below to dismiss the bill on the ground that, because * * * [appellee] had made no effort to * * * apply to the zoning board of appeals for relief as it might have done under the terms of the ordinance, the suit was premature. The motion was properly overruled. * * * the ordinance, in effect, constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear."

That the Court, without saying so, intended to obliterate these landmarks, certainly is not to be assumed.

But even a narrower distinction will dispose of *Waterman*. He *could* have gone to the Tax Court. That remedy was available; it was *not* available here.

It is submitted that the questions here raised are substantial and are entitled to the consideration of this Court.

V. Opinions

The opinion of the court announced upon overruling appellee's motion for summary judgment, reported in 56 F. Supp. 308, and the court's opinion upon granting appellee's

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subsequent motion for judgment, not yet officially reported, are set forth in the appendix.

Respectfully submitted,

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August 12, 1947.

APPENDIX

Earlier Opinion of the Court Denying Appellee's Motion for Summary Judgment, 56 F. Supp. 308 (Filed August 2, 1944).

Civil Action No. 21866

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LINCOLN ELECTRIC COMPANY, *Plaintiff*,

v.

FRANK KNOX and JAMES V. FORRESTRAL, *Defendants*

Before Groner, Circuit Judge, and Bailey and Goldsborough, District Judges.

The case is now before us on a motion by defendants for summary judgment. The complaint of Lincoln Electric Company against Secretary Knox and Under-Secretary Forrestal was filed in this Court November 3, 1943. The main purpose was to obtain a decree that the Renegotiation Act, 50 U. S. C. A. Appendix, Section 1191, in its form prior to the amendments of February 25, 1944, is unconstitutional and unenforceable. Defendants answered January 20, 1944, denying unconstitutionality and setting up various other defenses. Subsequently the present motion was filed, in which the position of the defendants, shortly stated, is that the court lacks jurisdiction because the suit is in legal effect against the United States, which have not consented to be sued, and that the plaintiff has available to it adequate legal and administrative remedies.

Plaintiff is engaged in the manufacture and sale of electric equipment. The greater portion of its business is with customers scattered throughout the United States. The portion directly with the Departments of the United States is said to be less than 8% of the whole. The period here involved is the year ending December 31, 1942. Acting under the Renegotiation statute, defendants called on plaintiff for certain information in relation to its operations

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and sales for the year in question, and as a result of the examination of the data furnished, determined that plaintiff had realized 'excessive' profits of more than $3,000,000, and notified it that unless action were taken prior to November 5, 1943, in making proper restitution, defendants would direct the withholding of amounts due plaintiff by the Government and would likewise direct the withholding by plaintiff's customers of so much as might be due to plaintiff by them.

Defendants subsequently—that is to say, in January, 1944, long after the suit was filed—withdrew their threat to seize funds due plaintiff by its customers, and thereafter relied for restitution upon the seizure of sums due by the United States. But as to this plaintiff says that its rights to relief accrued as of the facts existing when the suit was brought and that the subsequent modification of the threat will not avail, since defendants may again change their minds, as they have the right to do under the appropriate act. This brings us, then, for present purposes, to consider, (1) whether the suit is necessarily against the United States, and if it is not, (2) whether Congress has otherwise provided an adequate remedy in the amendment of 1944, authorizing redetermination in a proceeding in the Tax Court.

We are not unmindful of the difficulty of stating an exact formula for determining when a suit against an officer is a suit against the United States. *Brooks* v. *Dewar*, 313 U. S. 354, 359, 61 S. Ct. 979, 85 L. Ed. 1399. But where the relief asked is that the officer be restrained from acting to enforce an unconstitutional law in such a way as to injure the property rights of the plaintiff, the proceeding is one against the officer. The single exception is the situation in which the United States, because of the nature of the decree to be issued, are indispensable parties to the suit. If, for example, the object is to compel specific performance of a contract between the United States and the plaintiff, or to compel an officer to pay money out of the Treasury or otherwise to hand over to the plaintiff property which the United States claim to own, or to prevent the United States from

using property which they own, or claim to own—in all these cases the United States are the real parties in interest and the suit must fail. But the effect of an injunction in this case would not be to compel specific performance of a Government contract or payment of money out of the Treasury. The injunction would simply prevent a Government official from acting under an unconstitutional statute (if it should be found to be such), so as to interfere with valid contract relations between Lincoln and its customers. Whether the contracts will eventually be performed, and whether the money will be paid to Lincoln, depends upon many other circumstances which are not involved in the present action, and the right of the United States to withhold money owing to Lincoln is unaffected by anything which is asked for here.

If this is a correct statement of the case we have, then it would seem to follow that the suit is not against the United States and the dictrine announced in *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714, 13 L. R. A., N. S., 932, 14 Ann. Cas. 764, would be controlling. At page 159 of 209 U. S., 28 S. Ct. at page 454, 52 L. Ed. 714, 13 L. R. A., N. S., 932, 14 Ann. Cas. 764, the Supreme Court said:

"The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the State, to enforce legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

And see *United States* v. *Lee*, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171; *Philadelphia Co.* v. *Stimson*, 1912, 223 U. S.

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605, 32 S. Ct. 340, 56 L. Ed. 570; *Thompson* v. *Deal*, 67 App. D. C. 327, 92 F. 2d 478; *Ickes* v. *Fox*, 1937, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 1939, 306 U. S. 118, 59 S. Ct. 366, 83 L. Ed. 543; *Lane* v. *Watts*, 1914, 234 U. S. 525, 540, 34 S. Ct. 965, 58 L. Ed. 1440; *Goltra* v. *Weeks*, 1926, 271 U. S. 536, 46 S. Ct. 613, 70 L. Ed. 1074; *Franklin Township* v. *Tugwell*, 1936, 66 App. D. C. 42, 85 F. 2d 208.

Nor do we think plaintiff has elsewhere and otherwise an adequate remedy. The right to go to the Tax Court did not accrue until long after this suit was instituted, and even if it be considered that the relief afforded by the Tax Court provision is obligatory and exclusive, that certainly is not the case where, as here, it did not exist when suit was brought. *Dawson* v. *Kentucky Distilleries & W. Co.*, 255 U. S. 288, 41 S. Ct. 272, 65 L. Ed. 638. Nor is the right to sue the United States in the Court of Claims in the circumstances of this case an adequate remedy; for there is no such right there as to plaintiff's thousands of customers who necessarily would have to be sued separately and where they reside.

Plaintiff brought this suit in the only court having jurisdiction of the persons of the defendants. The controversy, as we have mentioned briefly, grows out of an Act of Congress designed to protect the United States against losses through improvident contracts made by officers of the Government in the war effort. Plaintiff insists that this legislation, as applied to the facts of this case, is unconstitutional, in that it is repugnant to Article I, Section 1, and Article I, Section 8, of the Constitution, and likewise repugnant to the Fifth and Tenth Amendments to the Constitution; that in the year in question all contracts made by it for the sale and disposition of its products were made upon the basis of fixed and stable prices, as to which there were no increases as the result of the war, and that in accepting orders from its customers, the same were taken upon an express agreement that there should be no readjustment or renegotiation of prices. Plaintiff further charges that if the Secretary is permitted to renegotiate its contract, not only with the United States, but with its

various customers, who in turn have contracted with the United States, the result would be to seriously impair its financial structure and would otherwise irreparably injure its capacity to operate successfully.

Defendants insist that, notwithstanding this and granting also that the Act of Congress is unconstitutional, plaintiff has no other recourse than to challenge the claimed right of the Government in the Tax Court or in the Court of Claims.

We think this is not sufficient. In our opinion the case should be tried on the merits and plaintiff given the opportunity of proving its case, and the question of the constitutionality of the Act of Congress should be briefed and argued. The rule for summary judgment was, in our opinion, never intended to throw upon the court the burden of determining a case involving, on the one hand, a delicate question of law and, on the other, complicated and controverted facts, without an adequate and proper hearing. If the Renegotiation Act is in all respects valid, obviously, plaintiff has no case. If, on the other hand, it is invalid, and the Government, as we have indicated, is not an essential party, then, clearly, plaintiff ought not to be stopped at the threshold of the court and told to seek relief in some other court and in some other manner obviously inadequate and incomplete.

The motion for summary judgment is denied, and an appropriate order will be entered accordingly.

Opinion of the Court Granting Appellee's Motion and Dismissing Complaint (Filed July 14, 1947)

Civil Action No. 21866

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LINCOLN ELECTRIC COMPANY, *Plaintiff*,

v.

FRANK KNOX and JAMES V. FORRESTAL, *Defendants*

Our decision of this case has been awaiting the decision of the Supreme Court in *Aircraft & Diesel Equipment Corporation* v. *Hirsch, et al.* In that case the Supreme Court on June 16, 1947 affirmed the decision of the District Court. In our opinion the instant case is controlled by that opinion of the Supreme Court and also by the case of *Wade* v. *Stimson* affirmed *per curiam* by that Court on the same day.

The plaintiff had its opportunity to pursue its administrative remedy and failed to take advantage of it.

The motion of the defendant for a summary judgment will be sustained and the complaint dismissed.

(S.) D. LAWRENCE GRONER,
U. S. Circuit Judge;
(S.) JENNINGS BAILEY,
U. S. District Judge;
(S.) T. ALAN GOLDSBOROUGH,
U. S. District Judge.

Order Issued by Appellee on October 23, 1943 Under Renegotiation Act

THE SECRETARY OF THE NAVY

WASHINGTON

Oct 23, 1943.

The Lincoln Electric Company
Cleveland, Ohio.

Subject: Renegotiation of The Lincoln Electric Company for the year ended December 31, 1942, pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

DEAR SIRS:

I have given careful consideration to your letter of October 18, 1943, addressed to me by J. F. Lincoln, President. I assume this constitutes your final presentation in this case and that you have no additional information or contentions to present to me which you deem are material to my determination of the amount of your excessive profits for said period and the renegotiability of the contracts and subcontracts giving rise thereto. The renegotiations between The Lincoln Electric Company for said period and the Navy Department appear, therefore, to have been concluded.

I have examined certain financial, operating and other data submitted by you, or obtained by me from governmental or other reliable sources, relating to the profits realized by you during said year under your contracts and subcontracts subject to renegotiation under said Section 403. You have been granted full opportunity to submit such additional information and to present such contentions as you deemed material in determining the excessiveness of said profits and the renegotiability of said contracts and subcontracts at hearings, of which due notice was given, and I have duly considered all of the financial, operating and other data and information so furnished, or obtained, and each of the contentions so presented.

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As a result of such renegotiation and pursuant to the authority and discretion vested in the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the Chairman of the Maritime Commission, the Administrator of the War Shipping Administration and the respective Boards of Directors of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation and Rubber Reserve Company under the provisions of Section 403, and duly delegated to me under subsection (f) thereof, I hereby find and determine that $3,250,000 of the profits realized by you during the year ended December 31, 1942, under your contracts and subcontracts subject to renegotiation pursuant to the provisions of Section 403, are excessive, plus such amount of the costs recorded on your books for such year which eventually are disallowed by the Bureau of Internal Revenue. In connection with the payment or discharge of such excessive profits, you shall be granted any tax credit to which you may be entitled under Section 3806 of the Internal Revenue Code.

Unless action is taken by you not later than November 5, 1943, to eliminate such excessive profits in a manner satisfactory to me, appropriate action in this respect will be taken by me without further notice to you, by directing the withholding of amounts otherwise due to you, as a contractor or subcontractor, by the Government and by prime contractors with the Government.

Very truly yours,

(Signed) JAMES FORRESTAL,
Acting Secretary of the Navy.

Text of Renegotiation Act and Amendments Thereto

The Renegotiation Act in question in this suit has been amended. Accordingly, the statute as it now appears in the Code is not the statute the Court has before it in this case.

In order, therefore, that the Court may have the statute in question in this suit conveniently before it, there are set forth herein the original Act and the subsequent amendments thereof.

Original Renegotiation Act

The original Renegotiation Act was enacted April 28, 1942, as Public Law 528, 77th Congress, 2d Session, 56 Stat. 226, 245. It reads:

SEC. 403. (a) For the purposes of this section, the term "Department" means the War Department, the Navy Department, and the Maritime Commission, respectively; in the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission; and the terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price. For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.

(b) The Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department

(1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty;

(2) a provision for the retention by the United States or the repayment to the United States of

(A) any amount of the contract price which is found as a result of such renegotiation to represent excessive profits and

(B) an amount of the contract price equal to the amount of the reduction in the contract price of any subcontract under such contract pursuant to the renegotiation of such subcontract as provided in clause (3) of this subsection; and

(3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract

(A) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty,

(B) a provision for the retention by the United States or the repayment to the United States of any amount of the contract price of the subcontract which is found as a result of such renegotiation, to represent excessive profits, and

(C) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by or repaid to the United States.

(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder,

(1) to require the contractor or subcontractor to renegotiate the contract price,

(2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and

(3) in case any amount of the contract price found as a result of such reengotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor.

Such contractor or subcontractor shall be deemed to be indebted to the United States for any amount which such Secretary is authorized to recover from such contractor or subcontractor under this subsection, and such Secretary may bring actions in the appropriate courts of the United

States to recover such amount on behalf of the United States. All amounts recovered under this subsection shall be covered into the Treasury as miscellaneous receipts. This subsection shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act.

(d) In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable. For the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been or are being set up, or whether any excessive and unreasonable costs have been or are being incurred, each such Secretary shall have the same powers with respect to any such contractor that an agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of each such Secretary and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purposes of making examinations and determinations with respect to profits under this section.

(e) In addition to the powers conferred by existing law, the Secretary of each Department shall have the right to demand of any contractor who holds contracts with respect to which the provisions of this section are applicable in an aggregate amount in excess of $100,000, statements of

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actual costs of production and such other financial statements, at such times and in such form and detail, as such Secretary may require. Any person who wilfully fails or refuses to furnish any statement required of him under this subsection, or who knowingly furnishes any such statement containing information which is false or misleading in any material respect, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both. The powers conferred by this subsection shall be exercised in the case of any contractor by the Secretary of the Department holding the largest amount of such contracts with such contractor, or by such Secretary as may be mutually agreed to by the Secretaries concerned.

(f) The authority and discretion herein conferred upon the Secretary of each Department, in accordance with regulations prescribed by the President for the protection of the interests of the Government, may be delegated, in whole or in part, by him to such individuals or agencies in such Department as he may designate, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

(h) This section shall remain in force during the continuance of the present war and for three years after the termination of the war, but no court proceedings brought under this section shall abate by reason of the termination of the provisions of this section.

First Amendment, October 21, 1942

[Adding Treasury Department to renegotiating agencies and defining subcontracts]

On October 21, 1942, the Renegotiation Act was amended by Section 801 of the Revenue Act of 1942, Public Law 753, 77th Congress, 56 Stat. 798, 982.

The amending statute reads:

SEC. 801. RENEGOTIATION OF WAR CONTRACTS.

(a) Subsections (a), (b), and (c) of Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), are amended to read as follows:

SEC. 403. (a) For the purposes of this section—

(1) The term "Department" means the War Department, the Navy Department, the Treasury Department, and the Maritime Commission, respectively.

(2) In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission.

(3) The terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price.

(4) The term "excessive profits" means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

(5) The term "subcontract" means any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term "article" includes any material, part, assembly, machinery, equipment, or other personal property.

For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.

(b) Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department—

(1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty;

(2) a provision for the retention by the United States from amounts otherwise due the contractor, or for the repayment by him to the United States, if paid to him, of any excessive profits not eliminated through reductions in the contract price, or otherwise, as the Secretary may direct;

(3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract

(i) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty,

(ii) a provision for the retention by the contractor for the United States of the amount of any reduction in the contract price of any subcontract pursuant to its renegotiation hereunder, or for the repayment by the subcontractor to the United States of any excessive profits from such subcontract paid to him and not eliminated through reductions in the contract price or otherwise, as the Secretary may direct, and

(iii) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by the contractor or repaid by the subcontractor to the United States, and

(iv) in the discretion of the Secretary, a provision requiring any subcontractor to insert in any subcontract made by him under such subcontract, provisions corresponding to those of subparagraphs (3) and (4) of this subsection (b); and

(4) a provision for the retention by the United States from amounts otherwise due the contractor, or for repayment by him to the United States, as the Secretary may direct, of the amount of any reduction in the contract price of any subcontract under such contract, which the contractor is directed, pursuant to clause (3) of this subsection, to withhold from payments otherwise due the subcontractor and actually unpaid at the time the contractor receives such direction.

The provision for the renegotiation of the contract price, in the discretion of the Secretary,

(i) may fix the period or periods when or within which renegotiation shall be had; and

(ii) if in the opinion of the Secretary the provisions of the contract or subcontract are otherwise adequate to prevent excessive profits, may provide that renegotiation shall apply only to a portion of the contract or subcontract or shall not apply to performance during a specified period or periods and may also provide that the contract price in effect during any such period or periods shall not be subject to renegotiation.

(c) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any sub-

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contract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract

(i) by reductions in the contract price of the contract or subcontract, or by other revision in its term; or

(ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or

(iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or

(iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or

(v) by any combination of these methods, as the Secretary deems desirable.

The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive

profits thereon. All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts.

(3) In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the character which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2E of the Internal Revenue Code. In determining the amount of any excessive profits to be eliminated hereunder the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in section 3806 of the Internal Revenue Code.

(4) Upon renegotiation pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section, as the Secretary deems desirable. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable. Any such agreement shall be final and conclusive according to its terms; and except upon a showing of fraud or malfeasance or a wilful misrepresentation of a material fact,

(i) such agreement shall not be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States; and

(ii) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

(5) Any contractor or subcontractor who holds contracts or subcontracts, to which the provisions of this section are applicable, may file with the Secretaries of all the Departments concerned statements of actual costs of production and such other financial statements for any prior fiscal year or years of such contractor or subcontractor, in such form and detail, as the Secretaries shall prescribe by joint regulation. Within one year after the filing of such statements, or within such shorter period as may be prescribed by such joint regulation, the Secretary of a Department may give the contractor or subcontractor written notice, in form and manner to be prescribed in such joint regulation, that the Secretary is of the opinion that the profits realized from some or all of such contracts or subcontracts may be excessive, and fixing a date and place for an initial conference to be held within sixty days thereafter. If such notice is not given and renegotiation commenced by the Secretary within such sixty days the contractor or subcontractor shall not thereafter be required to renegotiate to eliminate excessive profits realized from any such contract or subcontract during such fiscal year or years and any liabilities of the contractor or subcontractor for excessive profits realized during such period shall be thereby discharged.

(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless

(i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942, or

(ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is

exempted under subsection (i), of this section 403, or

(iii) the aggregate sales by the contractor or subcontractor and by all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder do not exceed, or in the opinion of the Secretary concerned will not exceed, $100,000 for the fiscal year of such contractor or subcontractor.

No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs.

(b) Subsection (f) of Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), is amended to read as follows:

(f) Subject to any regulations which the President may prescribe for the protection of the interests of the Government, the authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, or in any other Department with the consent of the Secretary of that Department, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(c) Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), is amended by adding at the end thereof the following subsections:

(i) (1) The provisions of this section shall not apply to—

(i) any contract by a Department with any other department, bureau, agency, or governmental

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corporation of the United States or with any Territory, possession, or State or any agency thereof or with any foreign government or any agency thereof; or

(ii) any contract or subcontract for the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, which has not been processed, refined, or treated beyond the first form or state suitable for industrial use; and the Secretaries are authorized by joint regulation, to define, interpret, and apply this exemption.

(2) The Secretary of a Department is authorized, in his discretion, to exempt from some or all of the provisions of this section—

(i) any contract or subcontract to be performed outside of the territorial limits of the continental United States or in Alaska;

(ii) any contracts or subcontracts under which, in the opinion of the Secretary, the profits can be determined with reasonable certainty when the contract price is established, such as certain classes of agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimum price for the sale of which has been fixed by a public regulatory body, of leases and license agreements, and of agreements where the period of performance under such contract or subcontract will not be in excess of thirty days; and

(iii) a portion of any contract or subcontract or performance thereunder during a specified period or periods, if in the opinion of the Secretary, the provisions of the contract are otherwise adequate to prevent excessive profits.

The Secretary may so exempt contracts and subcontracts both individually and by general classes or types.

(j) Nothing in Sections 109 and 113 of the Criminal Code (U. S. C., Title 18, Secs. 198 and 203) or in Section 190 of the Revised Statutes (U. S. C., Title 5, Sec. 99) shall be deemed to prevent any person appointed by the Secretary of a Department for intermittent and temporary employment in such Department, from acting as counsel, agent, or attorney for prosecuting any claim against the United States: *Provided,* That such person shall not prosecute any claim against the United States (1) which arises from any matter directly connected with which such person is employed, or (2) during the period such person is engaged in intermittent and temporary employment in a Department.

(d) The amendments made by this section shall be effective as of April 28, 1942.

SECOND AMENDMENT, JULY 1, 1943

[Adding Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company to renegotiating agencies.]

The second amendment came on July 1, 1943, by Section 1 of the Military Appropriation Act, 1944, Public Law 108, 78th Congress, 57 Stat. 347, 348. This amending act reads:

Provided further, That clauses (1) and (2) of subsection (a) of section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, are amended to read as follows:

SEC. 403. (a) For the purposes of this section—

1. The term "Department" means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

2. In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commis-

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sion, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term "Secretary" means the board of directors of the appropriate corporation.

Provided further, That section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, is further amended by adding at the end thereof the following subsection:

(k) All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company.

THIRD AMENDMENT, JULY 14, 1943

[Adding War Brokers' Contracts.]

The statute was amended again on July 14, 1943 by Public Law 149, 78th Congress, 57 Stat. 564, to subject war brokers' contracts to the statute. The amending act reads:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of section 403 (a) (5) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, is amended to read as follows: "The term 'subcontract' means (i) any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of any other contract or subcontract or (ii) any contract or arrangement (other than a contract or arrangement between two contracting parties, one of which parties is found by the Secretary to be a bona fide executive officer, partner, or full-time employee of the other contracting party), (A) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts thereunder, or determined with reference to the amount of such a contract or sub-

contract or such contracts or subcontracts, or (B) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts thereunder: *Provided*, That nothing in this sentence shall be construed (1) to affect in any way the validity or construction of provisions in any contract with a Department or any subcontract thereunder, heretofore at any time or hereafter made, prohibiting the payment of contingent fees or commissions; or (2) to restrict in any way the authority of the Secretary to determine the nature or amount of selling expenses under subcontracts as defined in (ii) herein, as a proper element of the contract price or as a reimbursable item of cost, under a contract with a Department or a subcontract thereunder."

SEC. 2. Section 403 (b) (3) of such Act, as amended, is amended by striking out "in each subcontract for an amount in excess of $100,000" and inserting in lieu thereof "in each subcontract described in subsection (a) (5) (ii) and in each subcontract for an amount in excess of $100,000 described in subsection (a) (5) (i)."

SEC. 3. The first paragraph of section 403 (c) (6) of such Act, as amended, is amended to read as follows:

"(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942; or (ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i), of this section 403; or (iii) the aggregate sales by and amounts payable to the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder (including those described in clauses (i)

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and (ii) of this subsection (6), but excluding subcontracts described in subsection (a) (5) (ii) do not exceed, or in the opinion of the Secretary will not exceed, $100,000, and under subcontracts described in subsection (a) (5) (ii) do not exceed, or in the opinion of the Secretary will not exceed, $25,000, for the fiscal year of such contractor or subcontractor."

SEC. 4. Section 403 (e) of such Act, as amended, is amended by striking out "in an aggregate amount in excess of $100,000."

SEC. 5. The amendments made by this Act shall be effective as of April 28, 1942.

Fourth Amendment, February 25, 1944.

[Revising Renegotiation Act.]

The statute was entirely revised by Title VII, Section 701 of the Revenue Act of 1943, enacted February 25, 1944, Public Law 235, 78th Congress, 58 Stat. 21, 78. As then revised the statute reads:

SEC. 701. RENEGOTIATION OF WAR CONTRACTS.

(a) TERMS USED.—Terms used in this section shall have the same meaning as when used in section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

Applicable Only to Fiscal Years Ending After June 30, 1943.

(b) RENEGOTIATION OF WAR CONTRACTS.—Section 403, as amended, of the Sixth Supplemental National Defense Appropriation Act, 1942, is amended to read as follows:

"SEC. 403. (a) For the purposes of this section—

"(1) The term 'Department' means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, the War Shipping Administration, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

"(2) In the case of the Maritime Commission, the term 'Secretary' means the Chairman of such Commission, in the case of the War Shipping Administration, the term 'Secretary' means the Administrator of such Administration, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term 'Secretary' means the board of directors of the appropriate corporation.

"(3) The terms 'renegotiate' and 'renegotiation' include a determination by agreement or order under this section of the amount of any excessive profits.

"(4) (A) The term 'excessive profits' means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this section to be excessive. In determining excessive profits there shall be taken into consideration the following factors:

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(i) efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs and economy in the use of materials, facilities, and manpower;

"(ii) reasonableness of costs and profits, with particular regard to volume of production, normal pre-war earnings, and comparison of war and peace time products;

"(iii) amount and source of public and private capital employed and net worth;

"(iv) extent of risk assumed, including the risk incident to reasonable pricing policies;

"(v) nature and extent of contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

"(vi) character of business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

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"(vii) such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted.

"(B) The term 'profits derived from contracts with the Departments and subcontracts' means the excess of the amount received or accrued under such contracts and subcontracts over the costs paid or incurred with respect thereto. Such costs shall be determined in accordance with the method of cost accounting regularly employed by the contractor in keeping his books, but if no such method of cost accounting has been employed, or if the method so employed does not, in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States properly reflect such costs, such costs shall be determined in accordance with such method as in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States does properly reflect such costs. Irrespective of the method employed or prescribed for determining such costs, no item of cost shall be charged to any contract with a Department or subcontract or used in any manner for the purpose of determining such cost, to the extent that in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States, such item is unreasonable or not properly chargeable to such contract or subcontract. Notwithstanding any other provisions of this section, all items estimated to be allowable as deductions and exclusions under Chapters 1 and 2 E of the Internal Revenue Code (excluding taxes measured by income) shall, to the extent allocable to such contracts and subcontracts (or, in the case of the recomputation of the amortization deduction, allocable to contracts with the Departments and subcontracts), be allowed as items of cost, but in determining the amount of excessive profits to be eliminated proper adjustment shall be made on account of the taxes so excluded, other than Federal taxes, which are attributable to the portion of the profits which are not excessive.

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(C) Notwithstanding any of the provisions of this section to the contrary, no amount shall be allowed as an item of cost (i) by reason of a recomputation of the amortization deduction pursuant to section 124 (d) of the Internal Revenue Code until after such recomputation has been made in connection with a determination of the taxes imposed by Chapters 1, 2A, 2B, 2D, and 2E of the Internal Revenue Code for the fiscal year to which the excessive profits determined by the renegotiation are attributable or (ii) by reason of the application of a carry-over or carry-back under any circumstances. The absence of such a recomputation of the amortization deductions referred to in clause (i) above shall not constitute a cause for postponing the making of an agreement, or the entry of an order, determining the amount of excessive profits, or for staying the elimination thereof.

Made Retroactive to April 28, 1942.

"(D) Notwithstanding any of the provisions of subsection (c) (4) of this section to the contrary, in the case of a renegotiation which is made prior to such recomputation, there shall be repaid by the United States (without interest) to the contractor or subcontractor after such recomputation the amount of a net renegotiation rebate computed in the following described manner. There shall first be ascertained the portion of the excessive profits determined by the renegotiation which is attributable to the fiscal year with respect to which a net renegotiation rebate is claimed by the contractor or subcontractor (hereinafter referred to as 'renegotiated year'). There shall then be ascertained the amount of the gross renegotiation rebate for the renegotiated year, which amount shall be an allocable part of the additional amortization deduction which is allowed for the renegotiated year upon the recomputation made pursuant to section 124 (d) of the Internal Revenue Code in connection with the determination of the taxes for such year and which is attributable to contracts with the Departments and subcontracts, except that the amount of the gross renegotiation rebate shall not exceed the amount of excessive profits eliminated for the renegotiated year

Made Retroactive to April 28, 1942.

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pursuant to the renegotiation. The allocation of the additional amortization deduction attributable to contracts with the Departments and subcontracts, and the allocation of the additional amortization deduction to the renegotiated year shall be determined in accordance with regulations prescribed by the Board. There shall then be ascertained the amount of the contractor's or subcontractor's Federal tax benefit from the renegotiation for the renegotiated year. Such Federal tax benefit shall be the amount by which the taxes for the renegotiated year under Chapters 1, 2A, 2B, 2D, and 2E of the Internal Revenue Code were decreased by reason of omitting from gross income (or by reason of the application of the provisions of section 3806 (a) of the International Revenue Code with respect to) that portion of the excessive profits for the renegotiated year which is equal to the amount of the gross renegotiation rebate. The amount by which the gross renegotiation rebate for the renegotiated year exceeds the amount of the contractor's or subcontractor's Federal tax benefit from the renegotiation for such year shall be the amount of the net renegotiation rebate for such year.

Made Retroactive to April 28, 1942.

"(5) The term 'subcontract' means—

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(A) Any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of any other contract or subcontract, but such term does not include any purchase order or agreement to furnish office supplies; or

"(B) Any contract or arrangement other than a contract or arrangement between two contracting parties, one of which parties is found by the Board to be a bona fide executive officer, partner, or full-time employee of the other contracting party, (i) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts, or determined with reference to the amount of such a contract or subcon-

tract or such contracts or subcontracts, or (ii) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts: *Provided*, That nothing in this sentence shall be construed (1) to affect in any way the validity or construction of provisions in any contract with a Department or any subcontract, heretofore at any time or hereafter made, prohibiting the payment of contingent fees or commissions; or (2) to restrict in any way the authority of the Secretary or the Board to determine the nature or amount of selling expenses under subcontracts as defined in this subparagraph, as a proper element of the contract price or as a reimbursable item of cost, under a contract with a Department or a subcontract.

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(6) The term 'article' includes any material, part, assembly, machinery, equipment, or other personal property.

"(7) The term 'standard commercial article' means an article—

"(A) which is identical in every material respect with an article which was manufactured and sold, and in general civilian, industrial, or commercial use prior to January 1, 1940,

"(B) which is identical in every material respect with an article which is manufactured and sold, as a competitive product, by more than one manufacturer, or which is an article of the same kind and having the same use or uses as an article manufactured and sold, as a competitive product, by more than one manufacturer, and

"(C) for which a maximum price has been established and is in effect under the Emergency Price Control Act of 1942, as amended, or under the Act of October 2, 1942, entitled 'An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes,' or which is sold at

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a price not in excess of the January 1, 1941, selling price.

An article made in whole or in part of substitute materials but otherwise identical in every material respect with the article with which it is compared under subparagraphs (A) and (B) shall be considered as identical in every material respect with such article with which it is so compared.

"(8) The term 'fiscal year' means the taxable year of the contractor or subcontractor under Chapter 1 of the Internal Revenue Code.

"9. The terms 'received or accrued' and 'paid or incurred' shall be construed according to the method of accounting employed by the contractor or subcontractor in keeping his books.

"(b) Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in each contract made by such Department thirty days or more after the date of the enactment of the Revenue Act of 1943 and involving an estimated amount of more than $100,000, a provision under which the contractor agrees—

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(1) to the elimination of excessive profits through renegotiation;

"(2) that there may be retained by the United States from amounts otherwise due the contractor, or that he will repay to the United States, if paid to him, any excessive profits;

"(3) that he will insert in each subcontract described in subsection (a) (5) (A) involving an estimated amount of more than $100,000, and in each subcontract described in subsection (a) (5) (B) involving an estimated amount of more than $25,000, a provision under which the subcontractor agrees—

"(A) to the elimination of excessive profits through renegotiation;

"(B) that there may be retained by the contractor for the United States from amounts otherwise due the subcontractor, or that the subcontractor will repay to the United States, if paid to him, any excessive profits;

"(C) that the contractor shall be relieved of all liability to the subcontractor on account of any amount so retained, or so repaid by the subcontractor to the United States;

"(D) that he will insert in each subcontract described in subsection (a) (5) (A) involving an estimated amount of more than $100,000, and in each subcontract described in subsection (a) (5) (B) involving an estimated amount of more than $25,000, provisions corresponding to those of subparagraphs (A), (B), and (C) and to those of this subparagraph;

"(4) that there may be retained by the United States from amounts otherwise due the contractor, or that he will repay to the United States, as the Secretary may direct, any amounts which under paragraph (3) (B) the contractor is directed to withhold from a subcontractor and which are actually unpaid at the time the contractor receives such direction.

Applicable Only to Fiscal Years Ending After June 30, 1943.

The obligations assumed by the contractor or subcontractor under paragraph (1) or (3) (A), as the case may be, agreeing to the elimination of excessive profits through renegotiation shall be binding on him only if the contract or subcontract, as the case may be, is subject to subsection (c). A provision inserted in a contract or subcontract, which recites in substance that the contract or subcontract shall be deemed to contain all the provisions required by this subsection shall be sufficient compliance with this subsection. Whether or not there is inserted in a contract with a Department or subcontract, to which subsection (c) is applicable, the provisions specified in this subsection, such contract or subcontract, as the case may be, shall be considered as having been made subject to such subsection

in the same manner and to the same extent as if such provisions had been inserted.

"(c) (1) Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding. At the conference, which may be adjourned from time to time, the Board shall endeavor to make a final or other agreement with the contractor or subcontractor with respect to the elimination of excessive profits received or accrued, and with respect to such other matters relating thereto as the Board deems advisable. Any such agreement, if made, may, with the consent of the contractor or subcontractor, also include provisions with respect to the elimination of excessive profits likely to be received or accrued. If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (c) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. The Board shall exercise its powers with respect to the aggregate of the amounts received or accrued during the fiscal year (or such other period as may be fixed by mutual agreement) by a contractor or subcontractor under contracts with the Departments and subcontracts, and not separately with respect to amounts received or accrued under separate contracts with the Departments or subcontracts, except that the Board may exercise such powers separately with respect to amounts received or accrued by the contractor or subcon-

Applicable Only to Fiscal Years Ending After June 30, 1943.

tractor under any one or more separate contracts with the Departments or subcontracts at the request of the contractor or subcontractor. Whenever the Board makes a determination with respect to the amount of excessive profits, whether such determination is made by order or is embodied in an agreement with the contractor or subcontractor, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination. Such statement shall not be used in The Tax Court of the United States as proof of the facts or conclusions stated therein.

"(2) Upon the making of an agreement or the entry of an order, under paragraph (1) by the Board, or the entry of an order under subsection (e) by The Tax Court of the United States, determining excessive profits, the Board shall forthwith authorize and direct the Secretaries or any of them to eliminate such excessive profits (A) by reductions in the amounts otherwise payable to the contractor under contracts with the Departments, or by other revision of their terms; or (B) by withholding from amounts otherwise due to the contractor any amount of such excessive profits; or (C) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to a subcontractor, any amount of such excessive profits of such subcontractor; or (D) by recovery from the contractor, through repayment, credit, or suit any amount of such excessive profits actually paid to him; or (E) by any combination of these methods, as is deemed desirable. Actions on behalf of the United States may be brought in the appropriate courts of the United States to recover from the contractor any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. Each contractor and subcontractor is hereby indemnified by the United States against all claims by any subcontractor on account of amounts with-

Applicable Only to Fiscal Years Ending After June 30, 1943.

held from such subcontractor pursuant to this paragraph. All money recovered in respect of amounts paid to the contractor from appropriations from the Treasury by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts. Upon the withholding of any amount of excessive profits or the crediting of any amount of excessive profits against amounts otherwise due a contractor, the Secretary shall certify the amount thereof to the Treasury and the appropriations of his Department shall be reduced by an amount equal to the amount so withheld or credited. The amount of such reductions shall be transferred to the surplus fund of the Treasury. In eliminating excessive profits the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in section 3806 of the Internal Revenue Code. For the purposes of this paragraph the term 'contractor' includes a subcontractor.

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(3) No proceeding to determine the amount of excessive profits shall be commenced more than one year after the close of the fiscal year in which such excessive profits were received or accrued, or more than one year after the statement required under paragraph (5) is filed with the Board, whichever is the later, and if such proceeding is not so commenced, then upon the expiration of one year following the close of such fiscal year, or one year following the date upon which such statement is so filed, whichever is the later, all liabilities of the contractor or subcontractor for excessive profits received or accrued during such fiscal year shall thereupon be discharged. If an agreement or order determining the amount of excessive profits is not made within one year following the commencement of the renegotiation proceeding, then upon the expiration of such one year all liabilities of the contractor or subcontractor for excessive profits with respect to which such proceeding was commenced shall thereupon be discharged, except that (A) if an order is made within such one year by the Secretary (or an officer or agency designated by the Secretary) pursuant to

a delegation of authority under subsection (d) (4), such one-year limitation shall not apply to review of such order by the Board, and (B) such one-year period may be extended by mutual agreement.

"(4) For the purposes of this section the Board may make final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section. Such agreements may contain such terms and conditions as the Board deems advisable. Any such agreement shall be conclusive according to its terms; and except upon a showing of fraud or malfeasance or a willful misrepresentation of a material fact, (A) such agreement shall not for the purposes of this section be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States, and (B) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(5) (A) Every contractor and subcontractor who holds contracts or subcontracts, to which the provisions of this subsection are applicable, shall, in such form and detail as the Board may by regulations prescribe, file with the Board on or before the first day of the fourth month following the close of the fiscal year (or if such fiscal year has closed on the date of the enactment of the Revenue Act of 1943, on or before the first day of the fourth month following the month in which such date of enactment falls), a financial statement setting forth such information as the Board may by regulations prescribe as necessary to carry out this section. In addition to the statement required under the preceding sentence, every such contractor or subcontractor shall, at such time or times and in such form and detail as the Board may by regulations prescribe, furnish the Board any information, records, or data which is determined by the Board to be necessary to carry out this section. Any person who wilfully fails or refuses to fur-

nish any statement, information, records, or data required of them under this subsection, or who knowingly furnishes any such statement, information, records, or data containing information which is false or misleading in any material respect, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both.

"(B) For the purposes of this section the Board shall have the same powers with respect to any such contractor or subcontractor that any agency designated by the President to exercise the powers conferred by Title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of the Board and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purpose of making examinations and audits under this section.

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(6) This subsection shall be applicable to all contracts and subcontracts, to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943, and whether or not such contracts or subcontracts contain the provisions required under subsection (b), unless (A) the contract or subcontract provides otherwise pursuant to subsection (i), or is exempted under subsection (i), or (B) the aggregate of the amounts received or accrued in such fiscal year by the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts (including those described in clause (A), but excluding subcontracts described in subsection (a) (5) (B)) do not exceed $500,000 and under subcontracts described in subsection (a) (5) (B) do not exceed $25,000 for such fiscal year. If such fiscal year is a fractional part of twelve

months, the $500,000 amount and the $25,000 amount shall be reduced to the same fractional part thereof for the purposes of this paragraph.

"(d) (1) There is hereby created a War Contracts Price Adjustment Board (in this section called the 'Board'), which shall consist of six members. One of the members shall be an officer or employee of the Department of War and shall be appointed by the Secretary of War, one shall be an officer or employee of the Department of the Navy and shall be appointed by the Secretary of the Navy, one shall be an officer or employee of the Department of the Treasury and shall be appointed by the Secretary of the Treasury, one shall be an officer or employee of the United States Maritime Commission or the War Shipping Administration and shall be appointed jointly by the Chairman of the United States Maritime Commission and the Administrator of the War Shipping Administration, one shall be an officer or employee of the Reconstruction Finance Corporation and shall be appointed by the Chairman of the board of directors of the Reconstruction Finance Corporation, and one shall be an officer or employee of the War Production Board and shall be appointed by the Chairman of the War Production Board. The members of the Board shall not receive additional compensation for service on the Board but shall be allowed and paid necessary travel and subsistence expenses (or a per diem in lieu thereof) while away from their official station on duties of the Board. They shall elect a chairman from among their members. The Board shall have a seal which shall be judicially noticed.

Effective as of Feb. 25, 1944.

"(2) The principal office of the Board shall be in the District of Columbia, but it or any division thereof may meet and exercise its powers at any other place within the United States. The Board may establish such number of field offices throughout the United States as it deems necessary to expedite the work of the Board. Four members of the Board shall constitute a quorum, and any power, function, or duty of the Board may be exercised or per-

formed by a majority of the members present if the members present constitute at least a quorum.

"(3) The Board is authorized, subject to the civil-service laws and the Classification Act of 1923, as amended, to employ and fix the compensation of such officers and employees as it deems necessary to assist it in carrying out its duties under this section. The Board may, with the consent of the head of the Department, agency, or instrumentality of the United States concerned, utilize the services of any officers or employees of the United States, and reimburse such Department, agency, or instrumentality for the services so utilized.

Effective as of Feb. 25, 1944.

"(4) The Board may delegate in whole or in part any power, function, or duty to the Secretary of a Department, and any power, function, or duty so delegated may be delegated in whole or in part by the Secretary to such officers or agencies of the United States as he may designate, and he may authorize successive redelegations of such powers, functions, and duties.

"(5) The chairman of the Board may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member, designate the chief thereof. The Board may also, by regulations or otherwise, determine the character of cases to be conducted initially by the Board through an officer or officers of, or utilized by, the Board, the character of cases to be conducted initially by the various officers and agencies authorized to exercise powers of the Board pursuant to paragraph (4), the character of cases to be conducted initially by the various divisions of the Board, and the character of cases to be conducted initially by the Board itself. The Board may review any determination by any such officer, agency, or division on its own motion, or in its discretion at the request of any contractor or subcontractor aggrieved thereby. Unless the Board upon its own motion initiates a review of such determination within 60 days from the date of such determina-

tion, or at the request of the contractor or subcontractor made within 60 days from the date of such determination initiates a review of such determination within 60 days from the date of such request, such determination shall be deemed the determination of the Board. Upon any review by the Board the Board may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the officer, agency, or division whose action is so reviewed.

Effective as of Feb. 25, 1944.

"(e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections, 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to rede-

Applicable Only to Fiscal Years Ending After June 30, 1943.

termine a deficiency. in the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2).

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

Effective as of Feb. 25, 1944.

"(f) For repricing of war contracts, see Title VIII of the Revenue Act of 1943.

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

"(h) This section shall apply only with respect to profits derived from contracts with the Departments and subcontracts which are attributable to performance prior to the termination date. For the purposes of this subsection—

"(1) The profits derived from any contract with a Department or subcontract which shall be deemed 'attributable to performance prior to the termination date' shall be—

"(A) in the case of any contract or subcontract the performance of which requires more than twelve months, or in the case of any contract or subcontract with respect to which the powers of the Board are exercised separately pursuant to subsection (c) (1) rather than on a fiscal-year basis, the portion of the profits so derived which is determined by the Board to be equal to the same percentage of the total profits so derived as the percentage of completion of the contract prior to the termination date; and

"(B) in all other cases, the profits so derived which are received or accrued prior to the termination date; and

"(2) The term 'termination date' means—

"(A) December 31, 1944; or

"(B) If the President not later than December 1, 1944, finds and by proclamation declares that competitive conditions have not been restored, such date not later than June 30, 1945, as may be specified by the President in such proclamation as the termination date; or

"(C) If the President, not later than June 30, 1945, finds and by proclamation declares that competitive conditions have been restored as of any date within six months prior to the issuance of such proclamation, the date as of which the President in such proclamation declares that competitive conditions have been restored;

Applicable Only to Fiscal Years Ending After June 30, 1943.

except that in no event shall the termination date extend beyond the date proclaimed by the President as the date of the termination of hostilities in the present war, or the date specified in a concurrent resolution of the two Houses of Congress as the date of such termination, whichever is the earlier.

"(i) (1) The provisions of this section shall not apply to—

"(A) any contract by a Department with any other department, bureau, agency, or governmental corporation of the United States or with any Territory, possession, or State or any agency thereof or with any foreign government or any agency thereof; or

"(B) any contract or subcontract for the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, which has not been processed, refined, or treated beyond the first form or state suitable for industrial use; or

"(C) any contract or subcontract for an agricultural commodity in its raw or natural state, or if the commodity is not customarily sold or has not an established market in its raw or natural state, in the first form or state, beyond the raw or natural state, in which it is customarily sold or in which it has an established market. The term 'agricultural commodity' as used herein shall include but shall not be limited to—

Made Retroactive to April 28, 1942.

"(i) commodities resulting from the cultivation of the soil such as grains of all kinds, fruits, nuts,

vegetables, hay, straw, cotton, tobacco, sugar cane, and sugar beets,

"(ii) natural resins, saps and gums of trees;

"(iii) animals such as cattle, hogs, poultry, and ship, fish and other marine life, and the produce of live animals, such as wool, eggs, milk and cream; or

Made Retroactive to April 28, 1942.

"(D) any contract or subcontract with an organization exempt from taxation under section 101 (6) of the Internal Revenue Code; or

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(E) any contract with a Department, awarded as a result of competitive bidding, for the construction of any building, structure, improvement, or facility; or

Made Retroactive to April 28, 1942.

"(F) any subcontract directly or indirectly under a contract or subcontract to which this section does not apply by reason of this paragraph.

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(2) The Board is authorized by regulation to interpret and apply the exemptions provided for in paragraph (1) (A), (B), (C), (E), and (F), and interpret and apply the definition contained in subsection (a) (7).

"(3) In the case of a contractor or subcontractor who produces or acquires the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, and processes, refines, or treats such a product to and beyond the first form or state suitable for industrial use, or who produces or acquires an agricultural product and processes, refines, or treats such a product to and beyond the first form or state in which it is customarily sold or in which it has an established market, the Board shall prescribe such regulations as may be necessary to give such contractor or subcontractor a cost allowance substantially

Made Retroactive to April 28, 1942.

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equivalent to the amount which would have been realized by such contractor or subcontractor if he had sold such product at such first form or state. Notwithstanding any other provisions of this section, there shall be excluded from consideration in determining whether or not a contractor or subcontractor has received or accrued excessive profits that portion of the profits, derived from contracts with the Departments and subcontracts, attributable to he increment in value of the excess inventory. For the purposes of this paragraph the term 'excess inventory' means inventory of products, hereinbefore described in this paragraph, acquired by the contractor or subcontractor in the form or at the state in which contracts for such products on hand or on contract would be exempted from this section by subsection (i) (1) (B) or (C), which is in excess of the inventory reasonably necessary to fulfill existing contracts or orders. That portion of the profits, derived from contracts with the Departments and subcontracts, attributable to the increment in value of the excess inventory, and the method of excluding such portion of profits from consideration in determining whether or not the contractor or subcontractor has received or accrued excessive profits, shall be determined in accordance with regulations prescribed by the Board. In the case of a renegotiation with respect to a fiscal year ending prior to July 1, 1943, the portion of the profits, derived from contracts with the Departments and subcontracts, attributable to the increment in value of the excess inventory shall (to the extent such portion does not exceed the excessive profits determined) be credited or refunded to the contractor or subcontractor, and in case the determination of excessive profits was made prior to the date of the enactment of the Revenue Act of 1943, such credit or refund shall be made notwithstanding such determination is embodied in an agreement with the contractor or subcontractor, but in either case such credit or refund shall be made only if the contractor or subcontractor, within ninety days after the date of the enactment of the Revenue Act of 1943, files a claim therefor with the Secretary concerned.

Made Retroactive to April 28, 1942.

"(4) The Board is authorized, in its discretion, to exempt from some or all of the provisions of this section—

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(A) any contract or subcontract to be performed outside of the territorial limits of the continental United States or in Alaska;

"(B) any contracts or subcontracts under which, in the opinion of the Board, the profits can be determined with reasonable certainty when the contract price is established, such as certain classes of agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimum price for the sale of which has been fixed by a public regulatory body, of leases and license agreements, and of agreements where the period of performance under such contract or subcontract will not be in excess of thirty days;

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(C) any contract or subcontract or performance thereunder during a specified period or periods, if in the opinion of the Board, the provisions of the contract are otherwise adequate to prevent excessive profits;

"(D) any contract or subcontract for the making or furnishing of a standard commercial article, if, in the opinion of the Board, competitive conditions affecting the sale of such article are such as will reasonably protect the Government against excessive prices;

"(E) any contract or subcontract, if, in the opinion of the Board, competitive conditions affecting the making of such contract or subcontract are such as are likely to result in effective competition with respect to the contract or subcontract price; and

"(F) any subcontract or group of subcontracts not otherwise exempt from the provisions of this section, if, in the opinion of the Board, it is not administratively feasible in the case of such subcontract or in the case of such group of subcontracts to determine and segregate the profits attributable to such subcon-

tract or group of subcontracts from the profits attributable to activities not subject to renegotiation.

The Board may so exempt contracts and subcontracts both individually and by general classes or types.

"(j) Nothing in sections 109 and 113 of the Criminal Code (U. S. C., title 18, secs. 198 and 203) or in section 190 of the Revised Statutes (U. S. C., title 5, sec. 99) shall be deemed to prevent any person by reason of service in a Department or the Board during the period (or a part thereof) beginning May 27, 1940, and ending six months after the termination of hostilities in the present war, as proclaimed by the President, from acting as counsel, agent, or attorney for prosecuting any claim against the United States: *Provided*, That such person shall not prosecute any claim against the United States (1) involving any subject matter directly connected with which such person was so employed, or (2) during the period such person is engaged in employment in a Department.

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(k) Nothing in this section shall be construed to limit or restrict any authority or discretion of the Secretary of a Department under the provisions of any other law.

"(l) This section may be cited as the 'Renegotiation Act.'"

Made Retroactive to April 28, 1942.

(c) TECHNICAL AMENDMENTS.—(1) Section 3806 (a) (1) (B) and (C) of the Internal Revenue Code (relating to mitigation of effect of renegotiation of war contracts) are respectively amended by striking out "by the Revenue Act of 1942."

Applicable Only to Fiscal Years Ending After June 30, 1943.

(2) Section 3806 (b) (1) and (b) (2) of the Internal Revenue Code (relating to credit against repayment on account of renegotiation) are respectively amended by inserting after "Chapter 2A," wherever appearing therein "Chapter 2B,".

(3) Section 3806 (b) of the Internal Revenue Code is further amended by renumbering paragraphs (2) and (3) as paragraphs (3) and (4), respectively, and by inserting after paragraph (1) the following new paragraph:

"(2) SPECIAL RULES AS TO INDIVIDUALS FOR 1942 AND 1943.—In the case of an individual subject to the provisions of sections 58, 59, and 60 of Chapter 1 and to the provisions of section 6 of the Current Tax Payment Act of 1943—

Made Retroactive to Oct. 21, 1942.

"(A) No credit shall be allowed under paragraph (1) of this subsection for any amount by which the tax for the taxable year 1942 under Chapter 1 is decreased by the application of paragraph (1) or paragraph (2) of subsection (a). If, contrary to the foregoing provisions of this subparagraph, any part of the amount shown on the return as such tax for the taxable year 1942 or any part of an amount assessed as such tax for such year or as an addition to such tax is credited against excessive profits eliminated for such year or against an amount disallowed for such year, the individual shall pay into the Treasury an amount equal to the amount of such credit, and if such amount is not voluntarily paid, the Commissioner shall, despite the provisions of the Current Tax Payment Act of 1943, collect the same under the usual methods employed to collect the tax imposed by Chapter 1. For the purposes of this section the amount required by this subparagraph to be paid into the Treasury shall be considered as an amount of excessive profits eliminated for the taxable year 1942, or an amount disallowed for such year, as the case may be; and despite the provisions of the Current Tax Payment Act of 1943, the payment of such amount shall not be considered as payment on account of the tax or estimated tax for the taxable year 1943.

Made Retroactive to Oct. 21, 1942.

"(B) In the case of a renegotiation with respect to the taxable year 1942 which is made after the enactment of the Current Tax Payment Act of 1943 and prior to the date on which the individual files his return

for the taxable year 1943 and with respect to which payment or repayment of the excessive profits eliminated or any part thereof is deferred by agreement, if the amount shown as the tax on the return for the taxable year 1943 reflects the application of paragraph (1) of subsection (a) with respect to the taxable year 1942 and is computed in accordance with the provisions of section 6 of the Current Tax Payment Act of 1943, there shall be credited against the excessive profits eliminated for the taxable year 1942 the amount by which the sum of the estimated tax previously paid for the taxable year 1943 and the payments on account of the taxable year 1942 which are treated as payments on account of the estimated tax for the taxable year 1943, exceeds the amount shown as the tax on the return for the taxable year 1943: *Provided,* That the amount allowable as a credit under the foregoing provisions of this subparagraph shall not exceed (i) the amount of credit of overpayment of tax provided for in the agreement deferring payment or repayment of excessive profits eliminated or (ii) the amount of excessive profits eliminated for the taxable year 1942 which, at the time the credit is allowed, have not been paid or repaid to the United States or an agency thereof or applied as an offset against other amounts due the individual. If any credit is allowed under this subparagraph, no other credit or refund under the internal revenue laws shall be made on account of the amount so allowed with respect to the taxable year 1943. Any credit of overpayment of tax allowed pursuant to the agreement deferring payment or repayment of excessive profits eliminated shall be considered as a credit allowed under this subparagraph.

Made Retroactive to Oct. 21, 1942.

"(C) Except as prevented by the provisions of the foregoing subparagraph (B), there shall be credited against the amount of excessive profits eliminated for the taxable year 1942 the amount by which the tax for the taxable year 1943 as computed under section 6 of the Current Tax Payment Act of 1943 is decreased

by reason of the application of paragraph (1) of subsection (a) with respect to the taxable year 1942; and there shall be credited against the amount disallowed for the taxable year 1942 the amount by which the tax for the taxable year 1943 as computed under section 6 of the Current Tax Payment Act of 1943 is decreased by reason of the application of paragraph (2) of subsection (a) with respect to the taxable year 1942.

For the purposes of the foregoing provisions of this paragraph, the terms 'taxable year 1942' and 'taxable year 1943' shall have the meanings assigned to them by section 6 (g) of the Current Tax Payment Act of 1943."

(4) The amendments made by paragraph (2) shall be effective as if they were a part of section 3806 of the Internal Revenue Code on the date of the enactment of the Revenue Act of 1942.

(d) EFFECTIVE DATE.—The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, except that (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (l) (D), (i) (l) (F), (i) (3), and (l) in section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, shall be effective as if such amendments and subsections had been a part of section 403 of such Act on the date of its enactment, and (2) the amendments adding subsection (d) and (e) (2) to section 403 of such Act shall be effective from the date of the enactment of this Act.

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In the Supreme Court of the United States

No. 320

OCTOBER TERM 1947.

LINCOLN ELECTRIC COMPANY,

Appellant,

vs.

JAMES V. FORRESTAL,

Appellee.

On Appeal from the District Court of the United States For the District of Columbia.

APPELLANT'S BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM.

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INDEX.

I. SUBSEQUENTLY ENACTED TAX COURT REMEDY DID NOT DESTROY RIGHT TO MAINTAIN SUIT 2

1. Statute Created Dilemma Fortifying Claim to Equity Court's Protection..... 2

—(a) Peril of Loss of Rights Real, as Cases Show 3

—(b) Resort to Administrative Process Required Only Where Rights Secure..... 7

2. Congress Itself Differentiated—It Did Not Destroy Right to Maintain Suit..... 8

3. Subsequently Provided Remedy Does Not Affect Jurisdiction Once Attaching..... 10

—(a) Congress Expressly Refused to Close Court's Doors 10

4. Questions Thus Arising Not Foreclosed by Other Cases Which Have Been Here..... 12

II. APPELLANT ELSEWHERE WITHOUT REMEDY.. 14

1. Appellant Faced with Threat of General Levy Upon Its Customers 14

—(a) Claimed Repentance Does Not Neutralize Threat 15

—(b) Appellant Still Exposed to Same Peril as it Originally Faced 17

2. It Could Not Work Out Its Rights by Suit Elsewhere 18

—(a) Certain Questions Admittedly Foreclosed in Such Other Suits 19

—(b) Even If Open, Other Questions beyond Possibility of Decision 21

—(c) Tucker Act Remedies Cannot in This Case Provide Relief 22

III. SUIT IS NOT ONE AGAINST UNITED STATES.... 24

CONCLUSION 25

TABLE OF AUTHORITIES.

Cases.

Aircraft & Diesel Equipment Corporation v. Hirsch (1947), 67 Sup. Ct. 1493, 91 Law ed. Adv. Op. 1313.....8, 9, 13, 20
Allen v. Regents (1938), 304 U. S. 439..... 25
American Life Insurance Co. v. Stewart (1937), 300 U. S. 203 .....10, 21
American Locker Co. (1930), 21 B. T. A. 408..... 5
Amick, Stoney (1930), 20 B. T. A. 501..... 4
Anniston Manufacturing Co. v. Davis (1937), 301 U. S. 337 8
Baumgartner, Lulu Vance (1930), 21 B. T. A. 623..... 5
Brewer, John Robert (1929), 17 B. T. A. 713..... 4
Burke, Lillian (1930), 21 B. T. A. 45..... 5
Cappellini (1929), 14 B. T. A. 1209..... 4
Cellers, A. (1929), 16 B. T. A. 411..... 4
Coffman v. Breeze Corporations, Inc. (1945), 323 U. S. 316..13, 19
Continental Oil Company (1931), 23 B. T. A. 311..... 5
Crane, J. T. (1930), 19 B. T. A. 881..... 4
Crosmar, R. W. (1931), 22 B. T. A. 390..... 5
Davis v. Wakelee (1895), 156 U. S. 680..... 19
Dawson v. Kentucky Distilleries & Warehouse Co. (1921), 255 U. S. 288.....2, 10
Delmege, George J. (1931), 22 B. T. A. 1059..... 5
Duggan, James (1930), 18 B. T. A. 608..... 4
Duval, J. E. (1931), 21 B. T. A. 1357..... 5
Essex, Lottie (1930), 19 B. T. A. 275..... 4
Fassett, In re (1892), 142 U. S. 479..... 6
Forshay, Stewart (1930), 20 B. T. A. 537..... 4
Garcin, Edward H. (1931), 22 B. T. A. 1027..... 5
Gleichman, Phil (1929), 17 B. T. A. 147..... 4
Gould, Ezra (1930) 21 B. T. A. 824..... 5
Great Falls Manufacturing Company v. The Attorney General (1888), 124 U. S. 581..... 5
Hadley, Sarah M. (1930), 19 B. T. A. 74..... 4
Hallowell v. Commons (1916), 239 U. S. 506..... 11
Hirsh v. Block (App. (D. C., 1920), 267 Fed. 614..... 5
Hooe v. United States (1910), 218 U. S. 322.....23-24
Howell, Charles M. (1930), 21 B. T. A. 757..... 5
Johnson, J. H. (1930), 19 B. T. A. 840..... 4
Jones, Lillie M. (1930), 21 B. T. A. 275..... 5
Kelly, John B., Inc. v. United States (1938), 87 Ct. Cl. 271.... 23
Kentucky Oil Corporation (1931), 21 B. T. A. 1150..... 5
Kline v. Burke Construction Co. (1922), 260 U. S. 226..... 11
Lamm, W. E. (1930), 21 B. T A. 107..... 5
Land v. Dollar (1947), 67 Sup. Ct. 1009, 91 Law ed. Adv. Op. 903, decided April 7, 1947..... 24
Lawrence v. St. Louis-San Francisco Railway Company (1927), 274 U. S. 588..... 7
Lord Manufacturing Co. v. Stimson, No. 36572, D. C., D. C. 17

Lorie, E. J. (1930), 21 B. T. A. 612 5
Macauley v. Waterman Steamship Corporation (1946), 327 U. S. 540 ..... 9, 13, 19
McDonald, Bruce (1930), 18 B. T. A. 800 4
McGlone, F. E. (1931), 22 B. T. A. 358 5
McGowin-Foshee Lumber Co. (1930), 20 B. T. A. 223 4
Mine Safety Appliances Co. v. Forrestal (1945), 326 U. S. 371 ..... 9, 13, 20, 24
Moorhead, William A. (1931), 22 B. T. A. 858 5
Mulford v. Smith (1939), 307 U. S. 38 25
Myers v. Bethlehem Shipbuilding Corp. (1938), 303 U. S. 41 ..... 8, 12
Newport Company, The (1931), 22 B. T. A. 833 5
Newport News Shipbuilding & Dry Dock Co. v. Schauffler (1938), 303 U. S. 54 12
Oklahoma v. United States Civil Service Commission (1947), 330 U. S. 127 7-8
Poindexter v. Greenhow (1884), 114 U. S. 270 24
Rauh, Charles S. (1931), 22 B. T. A. 662 5
Renyx, Guy W. (1931), 21 B. T. A. 1248 5
St. Louis-San Francisco Railway Company v. Alabama Public Service Commission (1929), 279 U. S. 560 7
Shlaudeman, Frank (1930), 21 B. T. A. 605 5
Small, G. G. (1929), 16 B. T. A. 658 4
Smallwood v. Gallardo (1927), 275 U. S. 56 11
South Penn Oil Co. (1930), 20 B. T. A. 1180 5
Steinle, Joseph A. (1930), 19 B. T. A. 325 4
Thomson, John Jr. (1930), 20 B. T. A. 1 4
United States v. Babcock (1919), 250 U. S. 328 23
United States v. Blair (1944), 321 U. S. 730 23
United States v. Goltra (1941), 312 U. S. 203 24
United States v. Ruzicka (1946), 329 U. S. 287 12
Upchurch Packing Co., Inc. v. United States (5 C. C. A., 1945), 151 F. (2d) 983 7
Van Horne v. Hines (App. D. C., 1941), 122 F. (2d) 207, cert. den. 314 U. S. 689 11
Van Meter, B. D. (1931), 22 B. T. A. 1202 5
Vaughan v. John C. Winston Co. (10 C. C. A., 1936), 83 F. (2d) 370 16
Wade v. Stimson (1947), 67 Sup. Ct. 1727, 91 Law ed. Adv. Op. 1391, decided June 16, 1947 ..... 8, 13, 20
Walling v. Helmerich & Payne, Inc. (1944), 323 U. S. 37 16
Waterman Steamship Corporation, Macauley, v. (1946), 327 U. S. 540 ..... 9, 13, 19
Wayne Body Corporation (1931), 22 B. T. A. 401 5
Weddell, Virginia Chase (1930), 21 B. T. A. 411 5
Wheeler, D. E. (1929), 16 B. T. A. 96 4
White Eagle Oil & Refining Co. (1930), 19 B. T. A. 185 4
Wickard v. Filburn (1942), 317 U. S. 111 25
Wilson v. Illinois Southern Railway Co. (1924), 263 U. S. 574 21
Woodley Petroleum Co. (1929), 16 B. T. A. 253 4
Yakus v. United States (1944), 321 U. S. 414 8

Texts.

Griswold, Erwin N., 57 *Harvard Law Review* 1153..... 22
1 *Pomeroy's Equity Jurisprudence,* Fifth Edition.....1, 14

Statutes.

Federal Tort Claims Act, 28 U. S. C. 921, 943..... 23
Judicial Code, 28 U. S. C. 384..... 19

Renegotiation Act:

Section 403(a)(4)(A) 9
Section 403(c)(1) 3, 8
Section 403(c)(2) 9, 22
Section 403(e)(1) 3, 23
Section 403(e)(2) 3, 8
Section 403(g) 22

90 Cong. Rec. 506 10-11
90 Cong. Rec. 530-5 11

Revenue Act of 1926, Section 280..... 4
Revenue Act of 1943, Section 701(d).....9, 22
Tucker Act, 28 U. S. C. 41 (20)..... 22

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In the Supreme Court of the United States

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OCTOBER TERM 1947.

LINCOLN ELECTRIC COMPANY,
Appellant,

vs.

JAMES V. FORRESTAL,
Appellee.

On Appeal from the District Court of the United States For the District of Columbia.

APPELLANT'S BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM.

The antidote for the motions to dismiss or affirm is in Pomeroy's[1] introductory chapter. As that view of the centuries shows, equity was born to provide a remedy for the litigant otherwise left, as here, to an uncertain fate.

Appellee, however, thinks (1) appellant has lost its rights because it did not, after this cause was at issue, dismiss to pursue the subsequently enacted Tax Court remedy, (2) there are remedies elsewhere—they are called adequate even though the concession is made that in no other forum would *all* questions be open to challenge—and (3) the suit is one against the United States.

If it so be held, it will not be because of anything this Court has yet ruled in any case. To the contrary, it will be in defiance of principles here repeatedly declared.

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[1] *Equity Jurisprudence,* Fifth Edition, Chapter 1, Sections I and II, pp. 1-91.

Inspection of appellee's argument will show that this is so.

I. SUBSEQUENTLY ENACTED TAX COURT REMEDY DID NOT DESTROY RIGHT TO MAINTAIN SUIT.

The weight of appellee's argument (appellee's brief,[2] pp. 5-8) rests upon the point that because appellant "failed to pursue its remedy in the Tax Court" its claim now is foreclosed. The argument is without merit:

1. Statute Created Dilemma Fortifying Claim to Equity Court's Protection.

Far from calling for dismissal, the subsequent amendment of the statute to permit suit in the Tax Court, itself created for appellant such peril of loss of rights as to fortify its call upon equity.

Let it be remembered that when this case was brought the Tax Court remedy was *not* available. The cases discussing it, and now relied upon for dismissal—although they do not deal with the problems this suit raises—lay far in the future.[3] Appellant at that stage had exhausted *all* administrative remedies. But, when, four months after the suit was brought and after the case was at issue, the Tax Court statute was enacted, this litigant plainly was confronted with a grave dilemma:

1. If it failed to file suit in the Tax Court, it faced the danger that it would—as now has happened upon the trial court's reversal of its earlier holding, 56

~~[2] The references are to the manuscript pages, appellee's brief being not yet in print.~~

[3] Even if those cases had rendered sure, as they do not, the Tax Court's power to give relief without attendant danger of loss of rights, this, as *Dawson v. Kentucky Distilleries & Warehouse Co.* (1921), 255 U. S. 288, 295-6, shows, would not have terminated appellants' right to the protection of the equity court, nor would it have warranted dismissal of the suit already pending.

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F. Supp. 308—be held not to have exhausted the administrative remedy, but

2. If it filed in the Tax Court, it faced the peril that it thereby would be held to have *waived* its right to challenge the statute on constitutional grounds and to have committed *final* decision of its rights to an administrative tribunal.

Appellant was in a pleasant position—between Scylla and Charybdis.

There was nothing unreal in the first peril. This is proved by what has happened. The suit has been dismissed on that very ground.

But the second peril was equally real.

The statute, while purporting to say that one circumstanced as was appellant, Section 403(e)(2), "*may*[4] • • • file a petition" in the Tax Court, appended to that grant the proviso, Section 403(e)(2), that "**Upon such filing,**" decision there "**shall be final and conclusive** and shall not be subject to review or redetermination by any court or other agency." Sections 403(e)(1) and 403(e)(1). It is no answer to say (p. 12-13 of appellee's brief) that if the Tax Court's decision cannot constitutionally be made final, appellant will not be hurt, whereas if it can appellant has no right to complain. The point is that constitutional rights *can be waived.*

To the peril—or even to the uncertainty—of such waiver, appellant cannot rightly be forced.

—(a) Peril of Loss of Rights Real, as Cases Show.

This danger of forfeiture, appellee would turn aside on the ground that by going to the Tax Court (p. 7 of appellee's brief) "Appellant would be seeking no license, franchise, or special benefit • • •." The peril is not lim-

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[4] Emphasis supplied throughout the brief.

ited to such cases. Rights may be lost by the mere filing of a proceeding.

Witness *Cappellini* (1929), 14 B. T. A. 1269, who, for doing no more, forfeited his rights.

Formerly, to assert a transferee liability in tax cases, the Commissioner had to proceed by bill in equity or suit at law against the transferee. To simplify the procedure, Congress enacted Section 280 of the Revenue Act of 1926, authorizing the Commissioner to issue notice of deficiency directly against the transferee "in the same manner and subject to the same provisions and limitations as in the case of a deficiency * * *." Cappellini, therefore, filed his petition with the Board of Tax Appeals, complaining, among other things, that the assessment of transferee liability was unconstitutional. And, even though both sides (p. 1271) "urged that the Board not only has the power, but it is its duty" to pass upon the constitutional questions, the Board found the rights were gone. It said (p. 1276):

> "It is a sufficient answer that constitutional rights may be waived * * * and if any constitutional rights of petitioners are violated by section 280 they have *waived* them **by initiating the proceeding** permitted by that section."

The Board has applied the same principle in at least 42 other cases.[5]

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[5] See for example: *D. E. Wheeler* (1929), 16 B. T. A. 96; *Woodley Petroleum Co.* (1929), 16 B. T. A. 253; *A. Cellers* (1929), 16 B. T. A. 411; *G. G. Small* (1929), 16 B. T. A. 658; *Phil Gleichman* (1929), 17 B. T. A. 147; *John Robert Brewer* (1929), 17 B. T. A. 713; *James Duggan* (1930), 18 B. T. A. 608; *Bruce McDonald* (1930), 18 B. T. A. 800; *Sarah M. Hadley* (1930), 19 B. T. A. 74; *White Eagle Oil & Refining Co.* (1930), 19 B. T. A. 185; *Lottie Essex* (1930), 19 B. T. A. 275; *Joseph A. Steinle* (1930), 19 B. T. A. 325; *J. H. Johnson* (1930), 19 B. T. A. 840; *J. T. Crane* (1930), 19 B. T. A. 881; *John Thomson, Jr.* (1930), 20 B. T. A. 1, 45; *McGowin-Foshee Lumber Co.* (1930), 20 B. T. A. 223; *Stoney Amick* (1930), 20 B. T. A. 501; *Stewart Forshay* (1930), 20 B. T.

(Continued on following page)

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This is not merely Tax Court doctrine.

The Court of Appeals of the District of Columbia applied the same rule in *Hirsh v. Block* (App. D. C., 1920), 267 Fed. 614, reversed on other grounds, 256 U. S. 135. There, in answer to the argument here advanced by appellee, that the litigant (p. 618) "should have pursued the remedy prescribed in the act, and, if unsuccessful, appeal," the court declared (p. 618):

> "plaintiff would be in poor position to question the jurisdiction which he had himself invoked, merely because of an adverse decision. If he should invoke the aid of the statute, and suffer defeat before the commission, **he would estop himself** to seek further relief on the ground of the unconstitutionality of the act."

For the same reasons, this Court held the complainant had waived its rights in *Great Falls Manufacturing Company v. The Attorney General* (1888), 124 U. S. 581. By act of Congress, land was appropriated for the use of the United States, unconstitutionally as the owner claimed. The statute authorized suit in the Court of Claims. The owner, challenging the taking as unconstitutional, filed an equity bill in the Circuit Court, and filed also, on the last day permitted by the statute, suit in the Court of Claims

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(*Continued from preceding page*)

A. 537; *South Penn Oil Co.* (1930), 20 B. T. A. 1180; *Lillian Burke* (1930), 21 B. T. A. 45; *W. E. Lamm* (1930), 21 B. T. A. 107; *Lillie M. Jones* (1930), 21 B. T. A. 275; *American Locker Co.* (1930), 21 B. T. A. 408; *Virginia Chase Weddell* (1930), 21 B. T. A. 411; *Frank Shlaudeman* (1930), 21 B. T. A. 605; *E. J. Lorie* (1930), 21 B. T. A. 612; *Lulu Vance Baumgartner* (1930), 21 B. T. A. 623; *Charles M. Howell* (1930), 21 B. T. A. 757; *Ezra Gould* (1930), 21 B. T. A. 824; *Kentucky Oil Corporation* (1931), 21 B. T. A. 1150; *Guy W. Renyx* (1931), 21 B. T. A. 1248; *J. E. Duval* (1931), 21 B. T. A. 1357; *F. E. McGlone* (1931), 22 B. T. A. 358; *R. W. Crosman* (1931), 22 B. T. A. 390; *Wayne Body Corporation* (1931), 22 B. T. A. 401; *Charles S. Rauh* (1931), 22 B. T. A. 662; *The Newport Company* (1931), 22 B. T. A. 833; *William A. Moorhead* (1931), 22 B. T. A. 858; *Edward H. Garcin* (1931), 22 B. T. A. 1027; *George J. Delmege* (1931), 22 B. T. A. 1059; *B. D. Van Meter* (1931), 22 B. T. A. 1202; *Continental Oil Company* (1931), 23 B. T. A. 311.

(p. 600) "from fear that, if it did not file * * * it might lose the right to demand compensation for its property." *Because it did so,* it lost its right to question the constitutionality of the taking. It did so, this Court said (p. 599), "**By the very act of suing** in the Court of Claims * * *." The Court said (p. 599):

> "plaintiff has voluntarily accepted the provisions of the act,"

and considered it (p. 600):

> "immaterial that the plaintiff invoked the jurisdiction of the Court of Claims from fear that, if it did not * * * it might lose the right to demand compensation * * *."

In re Fassett (1892), 142 U. S. 479, teaches the same lesson. A yacht was seized, wrongfully the owner thought, for customs duties. When he challenged the seizure in the district court, it was claimed his only remedy lay by appeal from the Collector to the Board and then to the courts. Under the statutes the Board was given jurisdiction to decide (p. 487) "the rate and amount" of the tax, much as the Tax Court under the present statute is given jurisdiction to decide the "amount, if any, of such excessive profits * * *." And even though, unlike the case here, a limited review by the courts was provided, the court upon that review could not (p. 487) "pass upon any question which the collector had no original authority to determine."

Therefore, said the Court, the own[illegible] who claimed his yacht was unlawfully seized, could properly petition the district court for its recovery and that to do otherwise would entail possible loss of rights because (p. 487):

> "Under the Customs Administrative Act, the libellant, in order to have the benefit of proceedings thereunder, must **concede** that the vessel is imported merchandise, which is the very question put in contention under the libel * * *."

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So here, even though the Congress could not make the Tax Court's decision unreviewably final at the cost of constitutional rights, a litigant obviously could concede that finality.[6] One who brings a proceeding brings it subject to the conditions imposed. A "plaintiff may not • • • contest the constitutionality of the conditions imposed." *Upchurch Packing Co., Inc. v. United States* (5 C. C. A., 1945), 151 F. (2d) 983, 985.

In any event, to ask appellant to rely upon assurances (pp. 7-8 of appellee's brief) that no constitutional rights would be sacrificed in the process, is to ask it to determine for itself that these cases, and others set forth in the jurisdictional statement (pp. 10-21), which never have been disavowed, henceforth are to be considered overruled.

—(b) Resort to Administrative Process Required Only Where Rights Secure.

It is a different matter where the circumstances are such that resort to the administrative process will not work loss of rights.

Where the statute itself provides for full review, with protection for all rights, pursuit of that course will work no waiver, *Oklahoma v. United States Civil Service Com-*

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[6] Appellee's appeal to authority (pp. 7-8 of appellee's brief) to support the point contended for is misplaced. He takes the gloss for the rule. Because a railroad cannot abandon an intrastate train service, *St. Louis-San Francisco Railway Company v. Alabama Public Service Commission* (1929), 279 U. S. 560, or move its shops, *Lawrence v. St. Louis-San Francisco Railway Company* (1927), 274 U. S. 588, without first applying to the state public service commission for leave, when, unlike the case here, 279 U. S. 560, 563, "No constitutional right could have been prejudiced by so doing," and, 274 U. S. 588, 592, when "No right or interest of the Railway would have been prejudiced by participating in the hearing • • •," it does not follow that when, as here, the hazard of such prejudice is clearly written in the cases, resort still must be had to the administrative process. The clear implication is the other way around.

~~[7] References to the jurisdictional statement, which is not yet in printed form, are to the filed typewritten copy.~~

mission, (1947), 330 U. S. 127, 139, nor is there reason for another choice where "the statute itself provides an expeditious means of testing the validity * * * without necessarily incurring any of the penalties * * *," *Yakus v. United States* (1944), 321 U. S. 414, 438, and where every right "may be heard and determined * * * in the course of the prescribed administrative procedure * * *," *Anniston Manufacturing Co. v. Davis* (1937), 301 U. S. 337, 346; *Myers v. Bethlehem Shipbuilding Corp.* (1938), 303 U. S. 41, 48.

The point is that here appellant was put to the hazard of loss of all its rights. This alone, as this Court, as recently as *Aircraft & Diesel Equipment Corporation v. Hirsch* (1947), 67 Sup. Ct. 1493, 91 Law ed. Adv. Op. 1313, decided June 16, 1947, recognized, is adequate "to dispense with exhausting the administrative process * * *."

2. Congress Itself Differentiated—It Did Not Destroy Right to Maintain Suit.

There is, moreover, solid ground for thinking that Congress did not intend the statute to apply as an inescapable condition precedent to litigants circumstanced as was this appellant.

Congress differentiated.

While saying as to others that the Board's decision, Section 403(c)(1), "**In the absence of** the filing of a petition with the Tax Court * * * shall be final * * *," it did *not* say so in the case of persons circumstanced as was this appellant. It appeared to put them in a different category by saying that such persons, Section 403(e)(2), "*may* * * * file a petition * * *."

This alone marks this as a case apart from *Aircraft*. In *Wade*[8] the point could not arise because he in fact *had*

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[8] *Wade v. Stimson* (1947), 67 Sup. Ct. 1727, 91 Law ed. Adv. Op. 1391, decided June 16, 1947, on the authority of *Aircraft*.

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filed in the Tax Court. Nor could it arise in *Waterman* (1946), 327 U. S. 540, because no order had there been issued. *Mine Safety* (1945), 326 U. S. 371, the only other renegotiation case which has been here, turned upon a different point.

That Congress did intend a different result seems all the more likely in view of the fact that in other respects also it differentiated between persons already subjected to an order, as was this appellant, and others against whom orders might issue as to later years. To cite only two examples, the Congress (1) provided[9] that the standards written into the 1944 act should not apply to a case such as this and (2) made inapplicable[10] to litigants such as this appellant the indemnity of the United States so largely relied upon in deciding *Aircraft*.

Because Congress thus, elsewhere in the statute so differentiated, added significance is given to the difference in language used in providing the Tax Court remedy. There is, indeed, reason, as the legislative history[11] shows, to think that Congress never thought it was by the original act giving to an administrative officer the broad and unrestrained power of compulsory seizure which appellee has read the statute to authorize. This alone would be enough, and an understandable ground, for the apparent difference in treatment which Congress wrote into the statute. In any event there is no reason for thinking Congress was careless of language. And, in seeking to give

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[9] Section 403(a)(4)(A) as amended, and Section 701(d) of the Revenue Act of 1943.

[10] Section 403(c)(2) as amended, and Section 701(d) of the Revenue Act of 1943.

[11] This history is much too long to set forth here. It is discussed in the briefs filed in the court below. It illuminates the questions—not decided in any case this Court has had—with which this case bristles. It serves also to mark the great probability that wrong has been done by the court below in reading the congressional mandate.

effect to the congressional intent, there is, of course, need to pay attention to the choice of language.

3. Subsequently Provided Remedy Does Not Affect Jurisdiction Once Attaching.

Moreover, even if otherwise applicable, the subsequently provided remedy could not operate to oust a jurisdiction once attaching as it indubitably did when this suit was filed. Equity does not lose jurisdiction "because since the filing of the bill an adequate legal remedy may have become available," *Dawson v. Kentucky Distilleries & Warehouse Co.* (1921), 255 U. S. 288, 296; *American Life Insurance Co. v. Stewart* (1937), 300 U. S. 203, 215. The trial court, upon its initial consideration, when the first motion was filed and rejected, agreed, pointing out that "The right to go to the Tax Court did not accrue until long after this suit was instituted, and even if it be considered that the relief afforded by the Tax Court provision is obligatory and exclusive, that certainly is not the case where, as here, it did not exist when suit was brought." 56 F. Supp. 308, 310.

—(a) Congress Expressly Refused to Close Court's Doors.

To the point that a subsequently enacted statute ordinarily will not be held to disturb a jurisdiction once attaching, appellee's answer (p. 19 of appellee's brief) is that the statute "deprives those courts of jurisdiction in pending cases." The fact is that the proposal that the doors of the courts be shut upon renegotiation matters was expressly rejected by Congress. Thus, when the revision which brought forth the Tax Court remedy was under consideration, Senator Truman, from the floor of the Senate, offered an amendment specifying that (90 Cong. Rec. 506):

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"Such petition shall constitute the exclusive method of review • • • and *no suit brought for the purpose of restraining a renegotiation* or the enforcement thereof, or the withholding or recovery of any amounts pursuant thereto, or for the purpose of compelling any actions in disregard of a renegotiation **shall be maintained in any court**, nor shall any renegotiation be set aside or disregarded in any suit or action in any court."

The amendment was ruled out of order but was pressed again. 90 Cong. Rec. 530-5. It brought a storm of disapproval and "was *rejected.*" 90 Cong. Rec. 535.

Where Congress has expressly refused to oust the jurisdiction of the courts and instead has chosen language appropriate in the case of the limited group circumstanced as was this appellant, to grant a right rather than to destroy a traditional jurisdiction already existing, it is no answer to say that, because Congress may grant or withhold jurisdiction, it has done so here. Authorities (p. 7 of appellee's brief) such as *Smallwood v. Gallardo* (1927), 275 U. S. 56, *Hallowell v. Commons* (1916), 239 U. S. 506, *Kline v. Burke Construction Co.* (1922), 260 U. S. 226, *Van Horne v. Hines* (App. D. C., 1941), 122 F. (2d) 207, certiorari denied 314 U. S. 689, are, therefore, beside the point.

Indeed, appellee's argument that jurisdiction has been destroyed is at variance with his admission below that, notwithstanding appellant's failure to go to the Tax Court, the court below still had jurisdiction to decide "in this proceeding" the constitutional questions (see jurisdictional statement, p. 18, note 19). The same admission was repeatedly made by appellee upon the oral argument below (see oral argument, January 13, 1947, pp. 66-7, 73-4, 104).[12]

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[12] For example, appellee's argument was (pp. 66-7):

"MR. SIEGEL: I do *not* challenge their right to raise the question of the validity of this Act, on its face, in this proceeding. • • •

(Continued on following page)

Likewise misplaced is appellee's assertion (p. 8 of appellee's brief) that "Similar rulings have been issued in the case of other statutes." Because exhaustion of the administrative process will be compelled (p. 8 of appellee's brief) as in:

Newport News Shipbuilding & Dry Dock Co. v. Schauffler (1938), 303 U. S. 54, where (p. 57) "The Act does not purport to leave the determination wholly to the Board. It • • • provides for judicial review by the Circuit Court of Appeals,"

Myers v. Bethlehem Shipbuilding Corp. (1938), 303 U. S. 41, where (p. 48) "the Act provided for • • • opportunity to secure judicial protection,"

United States v. Ruzicka (1946), 329 U. S. 287, where the statute permitted (p. 291) "review before the appropriate district court,"

it does not follow that, where loss of rights is, as here, plainly prophesied by the cases, a litigant will be dismissed to confront those very perils.

Plainly the cases are not "similar."

4. Questions Thus Arising Not Foreclosed by Other Cases Which Have Been Here.

These problems have not been considered in any of the renegotiation cases which have been here. They could not be. The factual situations were not such as to permit them to be raised. It is idle, therefore, to suggest, as does

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JUDGE BAILEY: Is it your position then that we cannot in any event determine whether or not the profits were excessive?

MR. SIEGEL: Cannot, Your Honor?

JUDGE BAILEY: Yes.

MR. SIEGEL: Correct.

JUDGE BAILEY: But, *we can determine whether the whole Act is constitutional or unconstitutional.*

MR. SIEGEL: That is correct."

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appellee (p. 5 of appellee's brief) that this case is governed by those earlier cases. It is not.

Of course the Court did not (appellee's brief, pp. 7-8) "intend to set a trap" for the litigants in those other cases. These questions did not even lurk in those cases. Thus:

Coffman (1945), 323 U. S. 316, dealt with a different statute, which itself provided for adjudication in the courts (p. 320). Moreover, Coffman failed to establish jurisdiction in equity on other grounds. All he needed to do was sue his one customer—who was not even asserting the defense of the statute. He could do so, moreover, freed from the hazards confronting this appellant.

Mine Safety (1945), 326 U. S. 371, turned on a different point. But even there, as the Court recognized (p. 373), "had the factual allegations supported these contentions [as they undeniably do here], the complaint • • • would • • • have provided a basis for the equitable relief sought."

Waterman (1946), 327 U. S. 540, was not even faced with an order. He accepted the statute. His fear was that the Board might read it too broadly. At best Waterman faced (p. 545) "future contingencies." Here they are present—now.

Aircraft and *Wade* had filed in the Tax Court. Their petitions were there pending. Whatever risk that entailed had already been incurred. It is obviously quite a different matter to *force* a litigant into that position where it is not certain that his rights will not be sacrificed in the process.

And, of course, in none of these cases were the actions pending—as was the case here where the cause already was at issue—when the Tax Court statute was passed.

In short, the situation which confronted this appellant, and which rendered doubtful the possibility of getting a

determination of its rights otherwise or elsewhere, save at the sacrifice of constitutional rights, was precisely that which it has been the great mission of equity to relieve. 1 POMEROY'S *Equity Jurisprudence*, Fifth Edition, p. 241, note 19. This alone, as this Court's cases show (see cases set forth in the jurisdictional statement, p. 21) is warrant enough for appellant's presence here.

II. APPELLANT ELSEWHERE WITHOUT REMEDY.

Appellee by use of quotation marks creates the illusion (appellee's brief, p. 7) that the court below held "there was no sufficient basis in the claim of multiplicity to sustain equity's assumption of jurisdiction." The court held no such thing. As it clearly declared (see opinion, July 14, 1947), it dismissed because of appellant's failure to go to the Tax Court. Appellant, the court held, failed "to pursue its administrative remedy * * *."

Since the court did not say otherwise, there is no reason to think it abandoned its earlier opinion, rejecting all suggestion that elsewhere there lay a remedy. 56 F. Supp. 308, 310.

1. Appellant Faced with Threat of General Levy Upon Its Customers.

Appellee's argument that there is no danger of a general levy rests upon a maneuver.

When the order was issued and this case filed, the threat which confronted appellant was that unless it paid appellee would execute the order forthwith (see order of October 23, 1943, R. Vol. I, pp. 11-2, paragraph 34, Transcript, pp. 272-3):[13]

> "without further notice to you, by directing the withholding of amounts otherwise due to you * * * by

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[13] References to the transcript are to the pages as numbered in the transcript certified to this Court.

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the Government and by prime contractors with the Government."

The threat thus was to make a general levy upon appellant's customers.

—(a) Claimed Repentance Does Not Neutralize Threat.

Appellee now hints that there is nothing to such fears. This is based upon the fact that on January 13, 1944, long after the suit was filed, appellee wrote appellant a letter purporting to abandon the threat to move against appellant's customers. This is what he said (R. Vol. I, pp. 13-4, paragraph 39, Transcript, pp. 274-5):

> "Reference is made to my letter to you of October 23, 1943, in which I found and determined that $3,250,000 of the profits realized by you during the year ended December 31, 1942, under your contracts and subcontracts pursuant to the provisions of said Section 403, are excessive, plus such amount of the costs recorded in your books for such year which eventually are disallowed by the Bureau of Internal Revenue.
>
> The last paragraph of my letter as aforesaid advised you as follows:
>
> > 'Unless action is taken by you not later than November 5, 1943, to eliminate such excessive profits in a manner satisfactory to me, appropriate action in this respect will be taken by me without further notice to you, by directing the withholding of amounts otherwise due to you, as a contractor or subcontractor, by the Government and by prime contractors with the Government.'
>
> As action has not been taken by you to eliminate such excessive profits, I have further considered the appropriate action in this respect to be taken by me. The elimination of the amount of your excessive profits, remaining after the allowance of the tax credit under Section 3806 of the Internal Revenue Code, can, it is believed, be accomplished by directing the with-

> holding of amounts otherwise due to you by the Government. I find that it will be appropriate to eliminate the excessive profits, without further notice to you, by that method. I do not propose to eliminate such excessive profits by directing the withholding of amounts otherwise due to you by prime contractors with the Government. You are accordingly so advised."

The purported retraction, it is to be noted, is not even unqualified. As the letter has it "it is believed" that the order could be so enforced. At best it was the expression merely of a then present belief that the order could be executed by levying upon appellant's funds in the hands of the Government.[14]

However that may be, the difficulty with the attempted change of position is that repentance came too late. The case already had been pending for more than two months. A court **"is not divested of power because a defendant suspends his wrongdoing when he is sued,** or protests his good intentions for the future." *Vaughan v. John C. Winston Co.* (10 C. C. A., 1936), 83 F. (2d) 370, 373. Nothing short of conduct irrevocably putting it beyond appellee's power ever again to assert the threat, could effectively remove it. Moreover, if appellee could so withdraw his earlier threat, there would be nothing to prevent his later withdrawal of the retraction. He would "be free to resume the use of this illegal plan were not some effective restraint made." *Walling v. Helmerich & Payne, Inc.* (1944), 323 U. S. 37, 43. And one asserting, as does appellee, the validity of the statute, is hardly in position to disavow the

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[14] All of the contracts upon which appellant was renegotiated, had been paid in full before the order was issued, save for $5,000 which remained unpaid, and $3,500 which had been charged off as bad debts (R. Vol. I, p. 10, paragraph 32, Transcript, p. 271). What appellee proposed to do was to seize, not the proceeds of the contracts here in question, but appellant's money—that is, sums "otherwise due to you [appellant]"—arising from entirely disassociated transactions and wherever it might be found.

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obligation to collect the balance, should the funds held by the Government prove insufficient, as they admittedly are.

The trial court rejected the argument that there is no longer danger of a general levy, when it ruled on the initial motion, 56 F. Supp. 308, and, having said nothing further, there is no reason to think it thereafter suffered a change of heart.[15] Plainly the eleventh-hour maneuver to defeat jurisdiction is itself a striking admission of its existence.

—(b) Appellant Still Exposed to Same Peril as it Originally Faced.

Nor can appellee be heard to say that, whatever may have been the situation when suit was filed, there no longer are "prime contractors" upon whom he could levy. This is because, in the view of the renegotiation authority, "once a prime contractor, always a prime contractor." Appellee made this clear upon the argument below. Thus, it was stated on behalf of appellee (oral argument, January 13, 1947, p. 82):

> "JUDGE GRONER: Can there be such a thing as a prime contractor now, involving government contracts?
>
> MR. SIEGEL: There can, for this reason: Beginning some time in August, 1945, I understand the Renegotiation agencies have taken the view that 'prime contractors' include *any* prime contractor of the United States, *even though his business* with the United States —contractor subject to renegotiation—*is of a commercial character* and not arising out of the war at all * * *."

This is settled renegotiation doctrine. *Lord Manufacturing Co. v. Stimson*, No. 36572 on the docket of the

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[15] As one of the judges said upon the oral argument which led to the dismissal on the sole ground of appellant's failure to pursue the administrative remedy (oral argument, January 13, 1947, p. 131):

> "I don't think that the so-called assurance amounts to a hill of beans. I think it was simply put there for the purpose of trying to avoid a legal situation."

District Court of the District of Columbia, so shows. There, after the contractor filed his suit in the Tax Court, defendant issued withholding orders which, as set forth in the court's opinion, filed March 18, 1947, and not yet reported, were:

> "(1) • • • not limited to sums due • • • upon subcontracts for Government work, but covered any sums due the plaintiff under any work, *commercial as well as Government;* and
>
> (2) • • • not limited to sums presently due but direct the withholding of all amounts due in the future • • •."

Whether the power is that broad, the court did not decide. It rejected, however, defendant's motion to dismiss. Whatever the ultimate answer may be, there can be no doubt about the position of the renegotiation authorities. As there stated by the court:

> "The Government concedes that the statute limits the withholding orders to concerns which have, or have had, contracts with the United States, but it says that the orders may cover any amounts due *upon any contracts*, Government or non-Government, from such concerns to their renegotiated subcontractors."

Manifestly, the threat which faces this appellant is as broad today as it was the day this suit was filed.

2. It Could Not Work Out Its Rights by Suit Elsewhere.

The suggestion (appellee's brief, p. 8) that there is a remedy by "action against a withholding contractor, or suit under the Tucker Act," is utterly without merit. The reasons why are set forth in the jurisdictional statement (pp. 23-24). Additionally, it should be noted:

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—(a) Certain Questions Admittedly Foreclosed in Such Other Suits.

As appellee's argument shows, appellant could not, in any such suggested suit, get a determination of the questions of "amount, coverage, and statutory construction." (See appellee's brief, p. 8.) They, it is said, are for the Tax Court. But in the present case those questions *could* be determined, so far as it might prove necessary to decide them to arrive at a decision. This is because equity, once taking jurisdiction, will decide all issues needful for a disposition of the case. (See cases set forth in the jurisdictional statement, p. 16.) But in any other forum, even appellee gives assurance that as to these questions there is (appellee's brief, p. 8) "a complete and final waiver." How then can it be asserted that elsewhere the remedy is "plain, adequate and complete"? 28 U. S. C. 384. "Where equity can give relief plaintiff **ought not to be compelled to speculate** upon the chance of his obtaining relief at law." *Davis v. Wakelee* (1895), 156 U. S. 680, 688. Plainly appellant brought its suit in the only court offering any hope for a full protection of its rights.

These questions, of course, could not be pertinent in any of the other renegotiation cases which have been here. Thus:

Coffman (1945), 323 U. S. 316, faced no such danger of a forum where he would be barred of some questions. To the contrary, he had a clear remedy under the statute—a different one than that here involved—or by direct suit against his customer where, without loss of rights, all questions would be open (p. 323).

Waterman (1946), 327 U. S. 540, was not faced with an order. His were only (p. 545) "future contingencies." Moreover, he brought no constitutional challenge to the statute; he accepted it. He, therefore, stood in no danger of losing something he did not claim.

Mine Safety (1945), 326 U. S. 371, did not raise the problem. However, the clear implication is that but for the agreement that defendant would, as he did, seize the funds—thus converting the suit into one to (p. 375) "reach money which the government owns,"—the case (p. 373) "Under our former decisions • • • would • • • have provided a basis for the equitable relief sought."

Aircraft and *Wade* had petitions pending in the Tax Court and thus put out of those cases the very issues which here arise. Whatever loss of rights that might entail, they already had incurred. Moreover, if, as appellee contends, only limited issues—aside from "amount, coverage, and statutory construction" (appellee's brief, p. 8)—could be open in a suit against the contractor, those issues in any event would be decided for *Aircraft* and *Wade* in the Tax Court. Thus all issues would, for them, ultimately be determined. To be sure, review of the Tax Court's decision might or might not be open—and constitutional rights might thus be gone—but that risk was one the litigants in those cases had already incurred.

This fatal flaw—of inability elsewhere to get **all** issues decided—afflicts even the suggestion that perhaps appellee, since he must either seize the company's funds in the hands of customers or sue appellant at law, may choose the latter course. But, in what is thus advertised as a single action at law, questions of "amount, coverage, and statutory construction" would not be open, appellee stoutly contends. These questions are said to be for the Tax Court. The consequence is that one unable, as this appellant, to go to the Tax Court because of attendant loss of rights, will be denied the right to get some of his questions answered unless he is willing to forego others. How then can an attempt to push a litigant from the only court which *can* decide all

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the questions involved, or so many as it may be necessary to decide, be justified on the ground that elsewhere he may be able to get some—but not all—of his questions decided?

But, even if all questions could so be raised and brought to an adjudication, a remedy, the choice of which rests with an adversary, can hardly be said to provide that full and certain remedy which this Court's decisions say it is the function of equity to dispense. " 'The remedy at law *cannot* be adequate if its adequacy depends upon the will of the opposing party.' " *American Life Insurance Co. v. Stewart* (1937), 300 U. S. 203, 215.

—(b) Even If Open, Other Questions beyond Possibility of Decision.

Even if all questions were open, suits against customers—who number in the thousands, are scattered through 47 states, and owe small amounts each—could not settle them.

For one thing, the decision on one point by any one court would not bind another.

For another, there never could be a decision whether too much had been taken. In each of the myriad of cases the court—assuming the statute to be valid—would be concerned only with the question whether the amount remaining to be recaptured, exceeded the amount for which suit was brought against the customer. Decision on that point in any one case could not be *res judicata* or otherwise binding in any other. The result would be that the entire amount would be taken without decision or opportunity for decision anywhere whether too much had been taken.

On this precise point the Court sustained jurisdiction against a similar assault in *Wilson v. Illinois Southern Railway Co.* (1924), 263 U. S. 574. As the Court said (p. 576):

"Assuming that * * * in such suits * * * plaintiffs, could set up the facts here relied upon * * * not only would those suits be many, but there would be insuperable

> difficulty in determining what the proper assessment against the whole road should be and in apportioning the due share to the county concerned. This difficulty *would recur in each of the five counties with not improbably different results in each.* It seems to us that the right of full defence in those suits, if it exists, is not an adequate remedy at law."

Even the theoretical possibility of a test suit is here illusory. One such is more likely to breed twenty. And no one who recalls the persistency with which government authority relitigates issues once settled, and the length to which it goes to develop a conflict—of which the tax cases are a notorious illustration (see Erwin N. Griswold, 57 HARVARD LAW REVIEW 1153)—can look to any one suit, unless it be in the equity court which can dispose of the whole controversy, with any expectation that it will settle his rights.[16] The indemnity provision of the statute, on the basis of which the Court thought it might be done in *Aircraft*, is expressly inapplicable here. The Congress said so. Section 403(c)(2), and Section 701(d) of the Revenue Act of 1943.

—(c) Tucker Act Remedies Cannot In This Case Provide Relief.

The tendered Tucker Act remedy is likewise valueless. Even if the other obstacles which confront appellant, already discussed, could be surmounted, appellant could not so obtain full relief.

So far as the District Court is concerned, the remedy by suit against the United States may be put aside because under the Tucker Act the District Court's jurisdiction is limited to $10,000. 28 U. S. C. 41(20). The tendered

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[16] Especially when the statute itself says "If any provision of this section or the application thereof *to any person* or circumstance is held invalid, the remainder of the section and the application of such provision *to other persons* or circumstances shall not be affected thereby." Section 403 (g).

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remedy thus subjects appellant to a ceiling wholly inadequate to accommodate the sum in controversy here.

So far as the Court of Claims is concerned, the possibility of remedy there is even more precarious. It is doubtful whether in the face of the statutory command putting decision first in the administrative officer and then in the Tax Court, without redetermination, Section 403(e)(1), "by any court or agency" the Court of Claims would, under any circumstances, have any jurisdiction whatever. Under like circumstances its jurisdiction has been denied. *United States v. Babcock* (1919), 250 U. S. 328; *John B. Kelly, Inc. v. United States* (1938), 87 Ct. Cl. 271, 276-7.

The reason is that in deciding whether to permit a recovery against itself the United States has a free hand. It is "under no obligation" to provide a remedy. *United States v. Babcock* (1919), 250 U. S. 328, 331. If, therefore, appellant is to have a remedy at all, it must be one to ward the blow **before** it falls. Once the money moves into the Treasury it well may be too late for *any* remedy. A whole new mass of rules then—because the claim would be against the sovereign—would come into play.

And certain it is that for such sums as appellee threatens to seize from customers, appellant could have no remedy in the Court of Claims. For such sums appellant has no contract with the United States. "Clearly the subcontractor could not recover this claim in a suit against the United States, for there was no express or implied contract between him and the Government." *United States v. Blair* (1944), 321 U. S. 730, 737.

Moreover, there can in no event be a recovery against the United States for tortious acts of its officers.[17] *Hooe*

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[17] The lately enacted Federal Tort Claims Act of August 2, 1946, 28 U. S. C. 921, if otherwise applicable, gives appellant no help because the statute expressly excludes claims based on acts of a government employee "in the execution of a statute • • • whether or not such statute • • • be valid • • •." 28 U. S. C. 943.

v. United States (1910), 218 U. S. 322, *United States v. Goltra* (1941), 312 U. S. 203. As the Court said in *Goltra* (p. 208):

> "Acts of government officials in taking property without authorization of Congress [and if the statute be invalid it is no law at all] confer no right of recovery upon the injured citizen."

Unless here, appellant is remediless. Even appellee suggests nothing to be had elsewhere save at the cost of essential rights. This Court, however, and the District Court, can stay appellee's hand and thus *prevent* happening that which once brought about would encompass appellant in irretrievable loss of rights.

III. SUIT IS NOT ONE AGAINST UNITED STATES.

One final point appellee makes. He says (appellee's brief, p. 10) the suit is one "against the United States to which the United States has not consented."

Either the case, as suggested in *Mine Safety* (1945), 326 U. S. 371, is one where it must be assumed (p. 374) "for the purpose of disposing of the jurisdictional issue, • • • that the Renegotiation Act is unconstitutional" or, as suggested in *Land v. Dollar* (1947), 67 Sup. Ct. 1009, 91 Law ed. Adv. Op. 903, decided April 7, 1947, it is one "where the question of jurisdiction is dependent on decision of the merits." If the former, and it is assumed the statute is unconstitutional, then appellee stands "stripped of his official character • • •, confessing a personal violation of the plaintiff's rights • • •," *Poindexter v. Greenhow* (1884), 114 U. S. 270, 288. If the latter, then, since the statute, for the reasons set forth in the jurisdictional statement (pp. 12-17), is plainly invalid, the wrong again is a personal one.

Mine Safety (1945), 326 U. S. 371, of course, does not control this case. There plaintiff *stipulated* that defendant should seize the funds—as he did. There remained nothing

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for the Court to do but dismiss. Here, as even appellee's argument shows there is little, if anything, owing to appellant from the United States. The threat is, as declared by appellee, to seize funds which "otherwise"—that is, but for the statute on which appellee relies—are concededly appellant's property.

The case is plainly the classic one for equity's protection. *Mulford v. Smith* (1939), 307 U. S. 38; *Allen v. Regents* (1938), 304 U. S. 439, 448; *Wickard v. Filburn* (1942), 317 U. S. 111.

CONCLUSION.

This case raises grave questions which desperately need the consideration of this Court. The motions to dismiss or affirm should be rejected, jurisdiction noted, and the case placed upon the general docket so that those questions may here be examined and right be done.

Respectfully submitted,

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September 12, 1947.

INDEX

	Page
Motions of appellee to dismiss or affirm	1
Statement of facts	2
Discussion	8
Conclusion	16

CITATIONS

Cases:	
Aircraft & Diesel Equipment Corp. v. *Hirsch*, October Term 1946, No. 95, decided June 16, 1947	2
Coffman v. *Breeze Corps.*, 323 U. S. 316	8
Electric Bond Co. v. *Comm'n*, 303 U. S. 419	11
Hallowell v. *Commons*, 239 U. S. 506	10
Kline v. *Burke Construction Co.*, 260 U. S. 226	10
Land v. *Dollar*, October Term 1946, No. 207, decided April 7, 1947	16
Lawrence v. *St. Louis-San Francisco Ry. Co.*, 274 U. S. 588	11
Macauley v. *Waterman Steamship Corp.*, 327 U. S. 540	8
Mine Safety Appliances Co. v. *Forrestal*, 326 U. S. 371	8, 15
Myers v. *Bethlehem Corp.*, 303 U. S. 41	11
Newport News Co. v. *Schauffler*, 303 U. S. 54	11
Oklahoma v. *Civil Service Comm.*, 330 U. S. 127	11
Smallwood v. *Gallardo*, 275 U. S. 56	10
St. Louis & R. Co. v. *Public Comm'n*, 279 U. S. 560	11
Stein Bros. Mfg. Co. v. *Secretary of War*, 7 T. C. 863	11
United States v. *Rusicka*, 329 U. S. 287	11
Van Horne v. *Hines*, 122 F. 2d 207, certiorari denied, 314 U. S. 689	10
Wade v. *Stimson*, October Term 1946, No. 724, decided June 16, 1947	2
Yakus v. *United States*, 321 U. S. 414	12
Statutes:	
Act of August 24, 1937, c. 754, Sec. 3, 50 Stat. 751, 752, 28 U. S. C. 380a	2
Renegotiation Act of April 28, 1942, as amended by Sec. 701 of the Revenue Act of 1943	5
Second Renegotiation Act (Revenue Act of 1943, Title VII, 58 Stat. 21, 78)	9
Section 403 (e) (2)	9
Sixth Supplemental National Defense Appropriation Act of 1942, Sec. 403	2
Tucker Act	13

760958—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 320

LINCOLN ELECTRIC COMPANY, APPELLANT

v.

JAMES V. FORRESTAL

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

MOTIONS OF APPELLEE TO DISMISS OR AFFIRM

These motions are filed by the appellee pursuant to paragraph 3 of Rule 12 of this Court, in response to the Statement as to Jurisdiction and other papers filed by the appellant, which urge this Court to review on appeal the judgment entered by the court below.

This action was commenced by appellant in the District Court of the United States for the District of Columbia to enjoin appellee, and his predecessor as Secretary of the Navy, from collecting the amount of "excessive war profits" determined under the Renegotiation Act to have been realized by appellant. A specially constituted three-judge court was convened pursuant to the

Act of August 24, 1937 (c. 754, Sec. 3, 50 Stat. 751, 752, 28 U. S. C. 380a). On July 14, 1947, the court handed down its opinion sustaining appellee's motion for a summary judgment and dismissing the complaint on the ground that the case was controlled by the decisions of this Court in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, October Term 1946, No. 95, and *Wade* v. *Stimson*, October Term 1946, No. 724, both decided June 16, 1947. Appellant's petition for appeal was allowed by the District Court on August 12, 1947.

STATEMENT OF FACTS

Appellant is an Ohio corporation engaged in the business of manufacturing and selling standard commercial arc welding electrodes, motor generator welding machines, and supplies (Stipulation, Vol. I, par. 2, p. 1).[1] On October 23, 1943, the Acting Secretary of the Navy, acting pursuant to authority delegated under Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, as amended, found that the profits realized by appellant on its renegotiable contracts and subcontracts for the year 1942 were excessive in the amount of $3,250,000 (*id.*, par. 34, pp. 11–12). By letter of the same date, the Act-

[1] The evidence before the District Court consisted largely of that contained in a (printed) stipulation filed July 16, 1946, and hereinafter referred to as "Stipulation." Other stipulations filed by the parties are identified by reference to the date filed.

ing Secretary advised appellant that unless it took action to eliminate such excessive profits by November 5, 1943, the Secretary would direct the withholding of sums otherwise due appellant by the Government and by prime contractors of the Government (*id.*, par. 34, p. 12). On January 13, 1944, after this action had been instituted, the Secretary further advised appellant that he did not propose to direct the withholding of amounts due appellant by prime contractors with the Government (Stipulation, Vol. III, pp. 152–153). The letter stated:

> The elimination of the amount of your excessive profits, remaining after the allowance of the tax credit under Section 3806 of the Internal Revenue Code, can, it is believed, be accomplished by directing the withholding of amounts otherwise due to you by the Government. I find that it will be appropriate to eliminate the excessive profits, without further notice to you, by that method. I do not propose to eliminate such excessive profits by directing the withholding of amounts otherwise due to you by prime contractors with the Government. You are accordingly so advised.

The Secretary's finding was made after informal hearing before the Navy Price Adjustment Board on September 24, 1943 (Stipulation, Vol. III, pp. 124–141) and opportunity, not availed of, to submit to the Secretary any additional in-

formation or contentions which appellant deemed material (*id.*, pp. 142, 146).

The evidence submitted by appellant to the Board[2] showed that its total sales had increased from $9,884,643.48 in 1939 to $33,515,444.92 in 1942 (Stipulation, Vol. I, Exh. 5, p. 29; Vol. III, p. 41); that its profits before Federal income taxes in the same period had jumped from $2,459,973.84 in 1939 to $9,007,512.87 (*ibid.*); and that, notwithstanding the several fold increase in its volume of business, appellant's percentage of profit to sales did not decline but rather increased during the same period (*ibid.*). The products sold by appellant

[2] The voluminous evidence considered by the Secretary (Stipulation, Vol. III) consisted almost entirely of (1) data submitted by appellant and testimony of Mr. Lincoln, president of the appellant company, bearing on appellant's costs and profits and its contention of superior efficiency, and (2) a report of the Bureau of Ships, Navy Department (*id.*, pp. 15–18) on the comparative efficiency of appellant and its competitors, copy of which was sent to appellant before the hearing (*id.*, p. 18).

The only other matters before the Secretary were statements made at a meeting of the Board held during a recess in the hearings of September 24, 1943, and not attended by appellant (Stipulation, Vol. III, pp. 136–137). At this meeting, the Board took note of the rate of profits allowed certain of appellant's competitors in other renegotiation proceedings, but did not consider any of the evidence on which such allowances had been made (*id.*, p. 136). Statements were also made on the same occasion as to appellant's refusal to take direct Government orders and the results of certain quality tests of appellant's products (*id.*, pp. 136–137). The Board did not purport to consider these statements, however; the Board listed in open hearing the factors which it had considered, both favorable and unfavorable (*id.*, p. 138).

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during 1942, according to appellant's own evidence, were standard commercial articles in use before the war involving no novel manufacturing methods (Stipulation, Vol. I, par. 10, p. 3; *id.*, Vol. III, p. 6), and appellant's capital investment from 1939 to 1942 remained substantially unchanged (Stipulation, Vol. I, Exh. 2, p. 23; Vol. III, p. 41).

Appellee treated $21,481,728 of appellant's sales during 1942 as renegotiable. These included certain sales entered into prior to April 28, 1942 (the date the Renegotiation Act was first enacted); sales to the Treasury Department prior to October 21, 1942 (the date the Act was retrospectively amended to name the Treasury Department as a renegotiating agency); sales in 1942 to Defense Plant Corporation and its contractors and subcontractors; sales on contract in amounts of less than $100,000; and sales to many purchasers other than agencies of the United States, both prior and subsequent to the retrospective amendment of October 21, 1942, legislatively defining "subcontracts" subject to renegotiation (Stipulation, Vol. I, par. 29, pp. 9–10). Appellant did not expressly agree to the renegotiation of any contract executed or accepted by it in 1942 and, after July 1, 1942, usually so stated in its acceptance of purchase orders (Stipulation, Vol. I, par. 26, pp. 7–8).

On February 25, 1944, the Renegotiation Act was amended by Section 701 of the Revenue Act

of 1943, which, among other things, vested exclusive jurisdiction in the Tax Court to determine excessive profits upon the filing of application therefor within 90 days after passage of the Revenue Act of 1943, by any person aggrieved by a unilateral order of the Secretary for a fiscal year ending prior to July 1, 1943. Appellant has never filed such application (Stipulation, filed October 16, 1946).

The bill of complaint, as originally filed on November 3, 1943, sought injunctive relief against the enforcement of the Renegotiation Act "on the ground that said Act is repugnant to the Constitution of the United States" (Complaint, par. 4). The amendments to the bill, filed pursuant to leave granted on October 16, 1946, long after the enactment of the Revenue Act of 1943, further alleged that the Secretary had exceeded his statutory authority in issuing the order in controversy (Complaint, par. 33a).

After answering, appellee moved for summary judgment on the ground, among others, that the suit was one against the United States and the court lacked equitable jurisdiction because the appellant had failed to exhaust its administrative remedies and had an adequate remedy at law. The District Court denied the motion on August 2, 1944. At the instance of the court, the parties entered into a partial stipulation of evidence, which was filed in July 1946.

On October 16, 1946, both parties moved for judgment, and on July 14, 1947, the District Court granted the appellee's motion and dismissed appellant's complaint, on the authority of *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* October Term, 1946, No. 95, and *Wade* v. *Stimson,* October Term, 1946, No. 724.

Appellant did not press its original application for a temporary restraining order or for an interlocutory injunction, on appellee's agreement not to execute or enforce the order determining excessive profits "pending the final determination of this cause" (Stipulation, Pars. 37–38, p. 13). The United States has therefore not collected any part of the excessive profits determined to have been made by appellant. There has been no withholding by the United States, on account of the appellee's excessive profits determination, of any amounts owing to appellant by the Government, nor has the Government ordered any of its contractors or subcontractors to withhold any sums owing to appellant. No bond has been required of appellant during the course of this litigation. The record shows that as of May 31, 1946, the United States owed appellant only $4,641.62 (Stipulation, Exhibit 37, p. 99), and the amount at present is probably less, if anything is owing at all. No suit has been brought against appellant to collect the amount of the excessive profits.

760958—47——2

DISCUSSION

This case is wholly governed by *Aircraft & Diesel Equipment Corp.* v. *Hirsch, supra; Wade* v. *Stimson, supra; Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540; *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371; and *Coffman* v. *Breeze Corps.*, 323 U. S. 316. In the light of those decisions, the questions raised here are so unsubstantial as not to warrant further argument. It is submitted that the decision below should be affirmed, or the appeal dismissed.

1. *Appellant has failed to pursue its remedy in the Tax Court.* *Aircraft* and *Wade* held that a war subcontractor, such as appellant,[3] seeking equitable relief against enforcement of a renegotiation order on the ground that the Renegotiation Act was both unconstitutional and inapplicable, was not entitled to invoke equity jurisdiction where he had neither exhausted his administrative remedy in the Tax Court nor pursued his adequate legal remedy of suit against a customer withholding sums pursuant to Government order. The instant case differs only in that suit was begun here before the Renegotiation Act was amended to establish the Tax Court remedy, and that appellant elected not to petition the Tax Court for redetermination. Neither of these dif-

[3] Appellant is also a contractor directly with the Government, and to that extent this suit is indisputably one against the United States. See *infra*, pp. 15–16.

ferences serves to mark off this case significantly from the *Aircraft* and *Wade* cases.

a. The Revenue Act of 1943, effective February 25, 1944, establishing Tax Court redetermination of excessive profits, was expressly made applicable to pre-existing renegotiation determinations, as well as to later orders; the statute gave contractors who had previously been renegotiated ninety days after February 25, 1944 to institute proceedings in the Tax Court, thus giving them the same status as contractors subsequently renegotiated (Section 403 (e) (2)).[4] Appellant, however, chose not to avail itself of this remedy which would, if the Tax Court had decided in its favor, have terminated all occasion for judicial action.

b. Appellant argues, however, that its suit was instituted in November 1943, prior to the enactment of the Revenue Act of 1943, and that equitable cognizance was not lost because of the later establishment of the Tax Court procedure. The

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[4] Section 403 (e) (2) provides in part as follows:

"Any contractor or subcontractor * * * aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with the Tax Court of the United States for a redetermination thereof * * *."

District Court's final opinion flatly rejected this contention and held that "The plaintiff had its opportunity to pursue its administrative remedy and failed to take advantage of it." This is clearly correct. The issue here is not merely the existence of an adequate remedy at law so as to preclude the commencement of an equitable suit. Congress has expressly established the requirement of administrative redetermination, and "Congress' commands for judicial self-restraint in this respect are not lightly to be disregarded." *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* slip opinion, p. 20. The Tax Court remedy was undeniably extended to appellant by Congress, and equally as exclusively as to other 1942 and 1943 determinations of excessive profits. In the absence of a saving clause for pending litigation, a statute conferring on another agency exclusive jurisdiction of causes previously within the jurisdiction of the federal courts deprives those courts of jurisdiction in pending cases. *Smallwood* v. *Gallardo,* 275 U. S. 56 (pending suit in equity); *Hallowell* v. *Commons,* 239 U. S. 506 (same); cf. *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 234; *Van Horne* v. *Hines,* 122 F. 2d 207 (App. D. C.) certiorari denied 314 U. S. 689. Upon the passage of the Revenue Act of 1943, appellant should have petitioned the Tax Court for redetermination, if it desired to continue its challenge to the Secretary's order.

c. The further contention that appellant would have forfeited its right to challenge the Act's constitutionality by prosecuting its remedy in the Tax Court is equally without merit. Appellant would be seeking no license, franchise, or special benefit from that court, but a redetermination from a tribunal with "essentially judicial procedures and experience" (*Aircraft* slip opinion, p. 15) that it had made no excessive war profits in 1942 and was accordingly free from the exaction which the Secretary's order imposed. Cf. *Oklahoma* v. *Civil Service Commission,* 330 U. S. 127, 139–140. It would be free to contest the Act's validity there, as others have done (cf. *Stein Bros. Mfg. Co.* v. *Secretary of War,* 7 T. C. 863, 876–882; *Aircraft* slip opinion p. 18, fn. 35), and it is clear that "no constitutional right could have been prejudiced by so doing." *St. Louis & R. Co.* v. *Public Comm'n,* 279 U. S. 560, 563; *Lawrence* v. *St. Louis-San Francisco Ry. Co.,* 274 U. S. 588, 592. In the *Aircraft* and *Wade* cases, this Court required contractors vigorously attacking the statute to complete their Tax Court proceedings, and the Court certainly did not intend to set a trap for these litigants. Similar rulings have issued in the case of other statutes. *Newport News Co.* v. *Schauffler,* 303 U. S. 54, 56; *Myers* v. *Bethlehem Corp.,* 303 U. S. 41, 50; *United States* v. *Ruzicka,* 329 U. S. 287, 294; cases cited *supra;* cf. *Electric Bond Co.* v.

Comm'n, 303 U. S. 419, 435. Little need be said of appellant's second asserted "peril", that by petitioning the Tax Court it might commit final decision on the issue of constitutionality to an administrative tribunal. If Congress did not intend the Tax Court to have final judgment on that question, or if the Constitution requires further judicial review and consideration, appellant would be free to bring a proper proceeding in a "constitutional court". If, however, final decision on constitutional issues has been left to the Tax Court, and validly so, appellant can hardly claim for itself the privilege of a decision by another tribunal.

d. *Macauley, Aircraft,* and *Wade, supra,* have settled that, at least as to issues of amount, coverage, and statutory construction, the Tax Court has original exclusive jurisdiction; and appellant's failure to bring those issues to that tribunal constitutes a complete and final waiver. *Yakus* v. *United States,* 321 U. S. 414, 444–447. Even as to questions of the Act's constitutional validity, *Aircraft* and *Wade* hold that completion of Tax Court proceedings is an indispensable prerequisite to a judicial proceeding in equity, such as this, where the renegotiated contractor has other adequate remedies upon which to call. *Aircraft* slip opinion, p. 20. As we show below, if appellant were hereafter to be faced with a demand by the Government or by a withholding order, it would have its remedy by defense to the Government's

suit, action against a withholding contractor, or suit under the Tucker Act, as the case might be. There was, therefore, no excuse for appellant's failure to resort to the Tax Court proceeding which Congress made available to it and indicated that it should pursue.

2. *Appellant has an adequate remedy at law and will suffer no irreparable injury.* In the *Aircraft* and *Wade* cases, withholding orders had been issued against customers of the renegotiated contractors, and funds owing to them were actually being withheld, but this Court held that equitable intervention was unnecessary because a suit against the withholding customers offered a "completely adequate remedy at law" (*Aircraft* slip opinion, p. 27). Cf. *Coffman* v. *Breeze Corp.*, 323 U. S. 316. Here there exists neither such actual damage nor the threat of irreparable injury, and *a fortiori* equitable relief is unwarranted.

The United States has not ordered any of appellant's purchasers to withhold any sums, and the appellee, as Secretary of the Navy, has unequivocably stated to appellant that he does not propose to issue such withholding orders (Stipulation, Vol. III, pp. 152–153) *supra*, p. 2. Moreover, by this time it is very doubtful that the United States could collect, without considerable difficulty, any substantial portion of the claimed sum by ordering its contractors to withhold from appellant, even if it desired to do so. As for direct withholding of sums owed by the United

States to appellant, the total amount currently owing (if any is still unpaid) (*supra*, p. 7) is obviously far too small to satisfy the Government's claim or to disturb appellant more than slightly. It is clear that the only means really available to the United States for collection of the sum in controversy is by action against appellant to recover the debt, and in such a suit appellant may raise any defense to which it is now entitled, including the unconstitutionality of the Renegotiation Act. The probability of such a single action at law cannot, of course, be said to be irreparable injury warranting the intervention of equity.

In the unlikely event that the United States, contrary to Secretary Forrestal's statement, should order a contractor to withhold from appellant, and such contractor did so withhold, there would be available, as in the *Aircraft* and *Wade* cases, the adequate remedy of suit against such a contractor. Appellant contends that, unlike Aircraft, its customers number in the thousands and the amounts owed by them are small. But, here, as in Aircraft, the District Court has implicitly determined that "there was no sufficient basis in the claim of multiplicity to sustain equity's assumption of jurisdiction", and appellant has not shown why it would be necessary to sue more than one of those of its customers to whom a withholding order might be issued "in order to secure a determination of its constitutional rights or

preserve its rights. A single test suit would serve the former purpose fully, and there are no allegations of fact sufficient to show that appellant's rights of recourse against others probably would be lost by awaiting the outcome of such a suit, either legally through the operation of statutes of limitations or practically * * * through any probable incidence of insolvency" (*Aircraft* slip opinion, pp. 25–26).[5]

3. ***This is a suit against the United States to which the United States has not consented.*** In present posture, it is clear that the only real controversy now in this case hinges on the small sums in the Treasury which may be owing to appellant and which the Government may possibly withhold at the conclusion of the litigation. Appellee has stated that no orders will be given to other contractors to withhold money due appellant; no such instructions have been given; and the Government has evinced no intention of rescinding its prior representation to appellant and of issuing such withholding orders in the future. Cf. *Mine Safety Appliances Co.* v. *Forrestal,* 326 U. S. 371, 373, fn. 3. In these circumstances, the holding in *Mine Safety* is clearly applicable. There, a rene-

[5] It may also be noted that although the *Aircraft* case concerned an excessive profits determination for the fiscal year ending November 30, 1943, which was governed by the Second Renegotiation Act (Revenue Act of 1943, Title VII, 58 Stat. 21, 78), *Wade* v. *Stimson*, decided on its authority, involved a renegotiation determination for the year *1942*, just as does the instant case.

gotiation order had been issued and the Secretary of the Navy sought to enforce it by withholding amounts otherwise due the contractor from the Government. A suit in the District Court to enjoin such withholding was held barred by the absence of the United States as a party, because the effect of the relief sought would be to compel payment of money from the Federal Treasury. Similarly, the present suit has now become "an indirect effort to collect a debt allegedly owed by the Government in a proceeding to which the Government has not consented." 326 U. S. 371, 375. Cf. *Aircraft & Diesel Equipment Corp.* v. *Hirsch, supra* slip, opinion p. 9; *Land* v. *Dollar,* October Term 1946, No. 207, decided April 7, 1947, slip opinion p. 5.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal herein should be dismissed or, in alternative, that the judgment below be affirmed, pursuant to paragraph 3 of Rule 12 and paragraphs 3 and 4 of Rule 7 of this Court.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1947.

Copy received August 27, 1947.

CHARLES EFFINGER SMOOT,
Attorney for Appellant.

U. S. GOVERNMENT PRINTING OFFICE: 1947

JUNE 14, 1948.

Per Curiam Decision.

No. 320. LINCOLN ELECTRIC CO. *v.* FORRESTAL, SECRETARY OF NATIONAL DEFENSE, ET AL. Appeal from the District Court of the United States for the District of Columbia. *Per Curiam:* The judgment is affirmed. *Lichter* v. *United States*, *Pownall* v. *United States*, and *Alexander Wool Combing Co.* v. *United States*, *ante*, p. 742, decided this day. MR. JUSTICE BURTON took no part in the consideration or decision of this case. *Ashley M. Van Duzer*, *Thomas V. Koykka* and *Charles Effinger Smoot* for appellant. *Solicitor General Perlman* for appellees. Reported below: 77 F. Supp. 444.